TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 206.

THE PEOPLE OF THE STATE OF NEW YORK *EX REL.* AUGUST SILZ, PLAINTIFF IN ERROR,

vs.

HENRY HESTERBERG, SHERIFF OF THE COUNTY OF KINGS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

FILED NOVEMBER 22, 1907.

(20,905.)

(20,905.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 502.

THE PEOPLE OF THE STATE OF NEW YORK *EX REL.* AUGUST SILZ, PLAINTIFF IN ERROR,

vs.

HENRY HESTERBERG, SHERIFF OF THE COUNTY OF KINGS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 25, 1907.

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a Court of Appeals, State of New York.

PEOPLE OF THE STATE OF NEW YORK *ex Rel.* AUGUST SILZ,
Respondent,
against
HENRY HESTERBERG, Sheriff of the County of Kings, Appellant.

Papers on Appeal from Final Order.

Finch & Coleman, Attorneys for Petitioner August Silz, Respondent, 32 Nassau Street, New York City.
John F. Clarke, District-Attorney of Kings County, for Appellant.

1 *Petition of August Silz for a Writ of Habeas Corpus.*

Supreme Court of New York, County of Kings.

THE PEOPLE OF THE STATE OF NEW YORK *ex Rel.* AUGUST SILZ
against
HENRY HESTERBERG, Sheriff of the County of Kings.

To Honorable Samuel T. Maddox, one of the Justices of the Supreme Court of the State of New York:

The petition of August Silz respectfully shows:

That he is a prisoner, restrained of his liberty and confined in the custody of Henry Hesterberg, Sheriff of the County of Kings, in the County Jail in said County.

That he has not been committed and is not detained by virtue of a mandate issued by a Court or a Judge of the United States, nor is he committed or detained by virtue of a final judgment or decree of a competent tribunal of civil or criminal jurisdiction; or
2 the final order of such tribunal, made in a Special Proceeding, or by virtue of an execution or other process, issued upon such a judgment, decree or final order, as specified in Section 2016 of the Code of Civil Procedure.

That the cause or pretense of such confinement is by virtue of a warrant and complaint made by one Edward J. Dooley, a Magistrate of the Borough of Brooklyn, City of New York, a copy of which is hereto annexed.

That such imprisonment under such pretense is illegal and that such illegality consists in the following among other things:

I.—That the imported golden plover possessed by your petitioner in the County of Kings on the 30th day of March, 1905, was lawfully taken, killed and captured in England during the open season for such game, and thereafter sold and consigned to your petitioner by a dealer in game in the City of London, England. That the imported blackcock possessed by your petitioner in the County of Kings on the 30th day of March, 1905, was lawfully taken, killed and cap-

tured in Russia during the open season for such game and sold and consigned to your petitioner by a dealer in the City of London, England. That said imported golden plover and imported blackcock were consigned to your petitioner in New York City by the said dealer from whom they were purchased in London, England. That thereafter your petitioner duly imported said golden plover and blackcock in accordance with the provisions of the Tariff Law and regulations in force through the Custom House at New York City into the City and State of New York, during the open season for plover and grouse, in the said State of New York.

That the said imported golden plover and imported black-
3 cock are entirely different varieties of game birds from the game birds known as plover and grouse in the State of New York or from any bird native to the State of New York or to America. That they are different in form, size, color and markings from the game birds known as plover and grouse in the State of New York, and from any American bird and can be easily and readily distinguished from such plover and grouse found in the State of New York, and from any bird native to America, both with their feathers on and after they are plucked, and after they are cooked and ready for the table. That such imported golden plover and imported blackcock possessed by your petitioner as aforesaid were and are staple, sound, wholesome and valuable articles of food, and are in constant use as such. That such imported plover and blackcock are recognized and staple articles of commerce between the different countries of Europe and the United States of America. That the fair market value of said imported golden plover and imported blackcock is one dollar and fifty cents ($1.50).

That there is no law of the State of New York which your petitioner has violated by the possession of the aforesaid imported golden plover and imported blackcock under the circumstances set forth above.

That the provisions of Chapter 20 of the Laws of Nineteen Hundred of the State of New York, known as the Forest, Fish and Game Law, which seek to make it a misdemeanor to possess such game birds under the circumstances set forth above, are unconstitutional and void, inasmuch as they violate the Constitution of the United States and the State of New York, in that it operates to deprive per-
sons of their liberty and property without due process of
4 law, and on the further grounds that it is an unjustifiable interference with foreign commerce.

Wherefore your petitioner prays that a writ of *habeas corpus* issue directed to the said Henry Hesterberg, Sheriff of the County of Kings, demanding the body of your petitioner forthwith before the Court or officer granting said writ, together with the time and cause of such imprisonment and detention, to the end that your petitioner may be bailed or discharged from custody according to the process of law.

Dated New York, April 7, 1905.

AUG. SILZ, *Petitioner.*

STATE OF NEW YORK, *County of Kings, ss:*

August Silz, being duly sworn, deposes and says: That he is the petitioner named in and who signed the foregoing petition. That he has read the foregoing petition and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated to be alleged on information and belief, and as to those he believes it to be true.

AUG. SILZ.

Sworn to before me this 7th day of April, 1905.

O. H. WALKER,
Commissioner of Deeds of the City of New York, Residing in the Borough of Brooklyn.

5 *Complaint Upon Which Aug. Silz was Held.*

STATE OF NEW YORK, *County of Kings, ss:*

John Fitzgibbons, being duly sworn, deposes and says: That he resides at 536 Hudson street, Manhattan; that on the 30th day of March, 1905, in the City and State of New York, County of Kings and Borough of Brooklyn, one August Silz did unlawfully, wilfully and wickedly, in violation of the provisions of Chapter 20 of the Laws of 1900, possess the following imported dead game birds, to wit, one imported golden plover, known in England as golden plover, and one imported grouse, known in England as black-game or blackcock. That the said August Silz is a dealer in foreign game, and that the said imported golden plover possessed by him as aforesaid was lawfully taken, killed and captured in England during the open season for such game and sold to the said August Silz by a dealer in game in the City of London, England; and that the said imported grouse possessed by said August Silz as aforesaid was lawfully taken, killed and captured in Russia during the open season for such game and sold to the said August Silz by a dealer in game in the City of London, England. That the said imported golden plover and imported grouse were afterward consigned by the said dealer in London, England, to the said August Silz at the City of New York. That the said August Silz duly imported said golden plover and imported grouse in accordance with the provisions of the tariff laws and regulations in force through the Custom House at New York City into the City and State of New York during the open season in the State of New York for such imported
6 golden plover and imported grouse. That the said imported golden plover and imported grouse are different varieties of game birds from the game birds known as plover and grouse in the State of New York, and from any bird native to America. They are different in form, shape, size, color and markings from the game birds known as plover and grouse in the State of New York, and can be easily and readily distinguished from such plover and grouse found in the State of New York, and from any American bird, both

with their feathers on and after they are plucked and after they are cooked and ready for the table. That such imported golden plover and imported grouse possessed by August Silz, as aforesaid, were and are staple, sound, wholesome and valuable articles of food, and are in constant use as such. That such imported golden plover and imported grouse are recognized and staple articles of commerce between the different countries of Europe and the United States of America.

That the said imported golden plover and imported grouse were of the fair market value of $1.50.

JOHN FITZGIBBONS.

Taken, subscribed and sworn to before me this 7th day of April, 1905.

EDWARD J. DOOLEY,
City Magistrate, Second Division, City of New York.

7 *Warrant Upon Which August Silz was Held.*

City Magistrates' Court, First District, Second Division.

CITY OF NEW YORK,
Borough of Brooklyn, County of Kings, ss:

In the name of the People of the State of New York to the Sheriff of the County of Kings, or to any Policeman of the Borough of Brooklyn, City of New York, or to any Peace Officer of the County of Kings, Greeting:

Whereas, complaint in writing, and upon oath has been made before the undersigned, one of the City Magistrates of the Borough of Brooklyn, City of New York, by John Fitzgibbon, of No. 536 Hudson street, Manhattan, that on the 30th day of March, 1905, at the Borough of Brooklyn, City of New York, in the County of Kings, one August Silz did unlawfully have in his possession one dead body of a bird known as "Golden Plover" and one dead body of a fowl known as a "Grouse," which were imported from England and Russia, and then brought within the Borough of Brooklyn, City of New York and State of New York, in violation of statute in such case made and provided.

Wherefore, the said complainant has prayed that the said defendant may be apprehended and bound to answer the said complaint.

There and therefore, in the name of the People of the State of New York, to command you, the said sheriff and policeman, each and every of you to apprehend the said defendant and bring him forthwith before me, at the Fifth District City Magistrates' Court in said county, or in my absence or inability to act, before the
8 nearest or most accessible City Magistrate in this county, to answer the said charge and be dealt with according to law.

Dated at the Borough of Brooklyn, City of New York, the 7th day of April, 1905.

EDWARD J. DOOLEY,
City Magistrate, Second Division, City of New York.

Writ of Habeas Corpus.

The People of the State of New York to Henry Hesterberg, Sheriff of the County of Kings:

We command you, that you have the body of August Silz, by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention, by whatsoever name he shall be called or charged, before me at Special Term for the hearing of motions, in the County Court House, in Kings County, on the 7th day of April, 1905, at 1 o'clock in the afternoon to do and receive what shall then and there be considered concerning him, and have you then and there this writ.

Witness, Hon. Samuel T. Maddox, one of the Justices of the Supreme Court of the State of New York, this 7th day of April, 1905.

By the Court.

[L. S.] EDWARD KAUFMANN, *Clerk.*

FINCH & COLEMAN,
Attorneys, for Petitioner,
32 *Nassau Street, New York City.*

(Endorsed:) The within writ allowed this 7th day of April, 1905. S. T. Maddox, Justice of Supreme Court of State of New York.

9 *Return of the Sheriff to the Writ of Habeas Corpus.*

New York Supreme Court, Kings County.

THE PEOPLE OF THE STATE OF NEW YORK *ex Rel.* AUGUST SILZ
against
HENRY HESTERBERG, Sheriff of the County of Kings.

The above named respondent, Henry Hesterberg, to the writ of *habeas corpus* herein issued, returns as follows:

I. That he is a sworn public officer, to wit, the Sheriff of the County of Kings, in the Borough of Brooklyn, and City of New York.

II. That at the time when said writ was served upon him he had in his custody and under his restraint the person for whose relief said writ was issued, to wit, August Silz.

III. That he still has him, the said August Silz, in his custody and under his restraint, and that the authority and true cause of the imprisonment and restraint of the said August Silz is a certain warrant of arrest out of the City Magistrate's Court, First District, Second Division, of the City of New York, dated at the Borough of Brooklyn, the 7th day of April, 1905, and subscribed by one
10 Edward J. Dooley, a City Magistrate of the Second Division of the City of New York; that said warrant was based on a

certain complaint or information, sworn to by one John Fitzgibbon, on the 7th day of April, 1905, before the said Edward J. Dooley as said Magistrate, of which warrant and information true copies are hereunto annexed and made a part hereof, and of which the respondent begs leave to produce and exhibit the originals upon the hearing hereon.

Signed this 11th day of April, 1905, at the Borough of Brooklyn, in the City of New York.

HENRY HESTERBERG,
Sheriff of the County of Kings.

Complaint Upon Which August Silz was Held.

STATE OF NEW YORK, *County of New York, ss:*

John Fitzgibbons, being duly sworn, deposes and says:

That he resides at 536 Hudson street, Manhattan; that on the 30th day of March, 1905, in the City and State of New York, County of Kings and Borough of Brooklyn, one August Silz did unlawfully, willfully and wickedly in violation of the provisions of Chapter 20 of the Laws of 1900, possess the following imported dead game birds, to wit, one imported golden plover, known in England as golden plover, and one imported grouse, known in England as black game or blackcock. That the said August Silz is a dealer in foreign game; and that the said imported golden plover possessed by him as aforesaid was lawfully taken, killed and captured in England
11 during the open season for such game and sold to the said August Silz by a dealer in game in the City of London, England; and that the said imported grouse possessed by said August Silz as aforesaid was lawfully killed and captured in Russia during the open season for such game and sold to the said August Silz by a dealer in game in the City of London, England. That the said imported golden plover and imported grouse were afterward consigned by the said dealer in London, England, to the said August Silz at the City of New York. That the said August Silz duly imported said golden plover and imported grouse in accordance with the provisions of the tariff laws and regulations in force, through the Custom House at New York City into the City and State of New York, during the open season in the State of New York for such imported golden plover and imported grouse. That the said imported golden plover and imported grouse are different varieties of game birds from the game birds known as plover and grouse in the State of New York, and from any bird native to America. They are different in form, shape, size, color and markings from the game birds known as plover and grouse in the State of New York and can be easily and readily distinguished from such plover and grouse found in the State of New York, and from any American bird, both with their feathers on and after they are plucked and after they are cooked and ready for the table. That such imported golden plover and imported grouse possessed by August Silz, as aforesaid, were and are staple, sound, wholesome and valuable articles of food, and are in constant use as

such. That such imported golden plover and imported grouse are recognized and staple articles of commerce between the different countries of Europe and the United States of America.

12 That the said imported golden plover and imported grouse were of the fair market value of $1.50.

JOHN FITZGIBBONS.

Taken, subscribed and sworn to before me this 7th day of April, 1905.

EDWARD J. DOOLEY,
City Magistrate, Second Division, City of New York.

Warrant Upon Which August Silz was Held.

City Magistrate's Court, First District, Second Division.

CITY OF NEW YORK,
Borough of Brooklyn, County of Kings, ss:

In the Name of the People of the State of New York to the Sheriff of the County of Kings, or to any Policeman of the Borough of Brooklyn, City of New York, or to any Peace Officer of the County of Kings, Greeting:

Whereas, complaint in writing, and upon oath, has been made before the undersigned, one of the City Magistrates of the Borough of Brooklyn, City of New York, by John Fitzgibbons, of No. 536 Hudson street, Manhattan, that on the 30th day of March, 1905, at the Borough of Brooklyn, City of New York, in the County of Kings, one August Silz did unlawfully have in his possession one dead body of a bird known as "Golden Plover" and one dead body of a fowl known as a "Grouse," which were imported from England and Russia and then brought within the Borough of Brook-

13 lyn, City of New York and State of New York, in violation of statute in such case made and provided;

Wherefore, the said complainant has prayed that the said defendant may be apprehended and bound to answer the said complaint;

There and therefore, in the name of the People of the State of New York, to command you, the said Sheriff and policeman, each and every of you, to apprehend the said defendant and bring him forthwith before me, at the Fifth District City Magistrate's Court, in said county, or in my absence or inability to act, before the nearest or most accessible City Magistrate in this county, to answer the said charge and be dealt with according to law.

Dated at the Borough of Brooklyn, City of New York, the 7th day of April, 1905.

EDWARD J. DOOLEY,
City Magistrate, Second Division, City of New York.

Demurrer of August Silz to Return of Sheriff.

New York Supreme Court, Kings County.

THE PEOPLE OF THE STATE OF NEW YORK *ex Rel.* AUGUST SILZ
against
HENRY HESTERBERG, Sheriff of the County of Kings.

The above named petitioner, August Silz, by Finch & Coleman, as his attorneys, demurs to the return of Henry Hesterberg,
14 Sheriff of the County of Kings, to the writ of *habeas corpus* heretofore granted herein upon the following grounds:

First. That the complaint annexed to said return upon which the said August Silz is held, does not state facts sufficient to constitute a cause of action against the said August Silz.

Second. That the provisions of Chapter Twenty of the Laws of Nineteen Hundred, of the State of New York, known as the Forest, Fish and Game Law, which seek to make it a misdemeanor to possess such birds under the circumstances set forth in said complaint, are unconstitutional and void, inasmuch as they violate the provisions of the Constitution of the United States and of the Constitution of the State of New York, in that they operate to deprive persons of their liberty and property without due process of law, and on the further ground that they constitute an unjustifiable interference with interstate and foreign commerce.

Third. That the possession of the imported golden plover and imported blackcock possessed by the said August Silz under the circumstances set forth in said complaint is not forbidden by the provisions of Chapter Twenty of the Laws of Nineteen Hundred of the State of New York, known as the Forest, Fish and Game Law, nor by the provisions of any law of the State of New York, inasmuch as the said birds do not come within the purview of said laws, being entirely different from any birds native to the State of New York or to the United States, and being easily and readily distinguishable from any birds native to the State of New York or to the United States, and from the birds, the possession of which is for-
15 bidden by the said provisions of Chapter Twenty of the Laws of Nineteen Hundred of the State of New York.

FINCH & COLEMAN,
Attorneys for Petitioner, August Silz.

Office and Post Office address, No. 32 Nassau Street, Borough of Manhattan, City of New York.

Final Order Dismissing Writ and Remanding August Silz, Entered June 16, 1905, Being the Order Appealed from Herein.

Supreme Court of New York, County of Kings.

THE PEOPLE OF THE STATE OF NEW YORK *ex Rel.* AUGUST SILZ
against
HENRY HESTERBERG, Sheriff of the County of Kings.

A writ of *habeas corpus* having been allowed herein by Hon. Samuel T. Maddox, one of the Justices of the Supreme Court, issued on April 7, 1905, directed to Henry Hesterberg, Sheriff of the County of Kings, and thereafter such proceedings having been had that the hearing upon the return of said writ came duly on to be heard at the County Court House of Kings County, whereupon said respondent Henry Hesterberg duly made his return thereto, to which the said relator then and there demurred, and after having
16 heard Finch and Coleman, Esqrs., attorneys for said relator, Silz, in favor of said writ and demurrer, and Robert H. Elder, Esq., Assistant District Attorney of Kings County, in opposition thereto, and Alexander T. Mason, Esq., Deputy Attorney General of the State of New York, likewise in opposition thereto, and due deliberation having been had, now, on reading and filing the original petition dated April 7, 1905, on which said *habeas corpus* was allowed, the return made thereto as aforesaid, and the demurrer to such return, it is hereby

Ordered, that said writ of *habeas corpus* be and the same is hereby quashed and the writ dismissed, and that said August Silz, the relator, be remanded to the custody of said Sheriff of Kings County.

J. T. M., *J. S. C.*

Notice of Appeal.

Supreme Court of New York, County of Kings.

THE PEOPLE OF THE STATE OF NEW YORK *ex Rel.* AUGUST SILZ
against
HENRY HESTERBERG, Sheriff of the County of Kings.

Please take notice that the above named August Silz appeals to the Appellate Division of the Supreme Court, Second De-
17 partment, from the final order entered herein in the office of the Clerk of the County of Kings on the 16th day of June, 1905, and from each and every part of said order.

Dated June 24, 1905.

FINCH & COLEMAN,
Attorneys for August Silz,

Office and P. O. address, 32 Nassau Street, Borough of Manhattan, City of New York.

To Edward Kaufmann, Esq.,
Clerk of the County of Kings.
John F. Clarke, Esq.,
District-Attorney of the County of Kings.

Opinion of Mr. Justice Maddox.

Supreme Court, Kings County.

PEOPLE OF THE STATE OF NEW YORK *ex Rel.* SILZ
vs.
HESTERBERG.

MADDOX, *J.*:

That the game birds of which the petitioners were possessed in the closed season, imported golden plover and imported grouse, were taken or killed and were imported into and received in this State in the open season, and that they are dissimilar to and readily
18 and easily distinguished from the plover and grouse of this State cannot relieve the petitioners here.

The statute, the Forest, Fish and Game Law (Chapter 20, Laws 1900), fixes the close season (Secs. 25 and 30 as amended; see Chapter 317, Laws 1902; Chap. 588, Laws 1904). Petitioners admit such possession during the closed season, and that is a violation of Sections 106 and 108 as amended by Chapter 588 of the Laws of 1904, Section 141 providing that "possession * * * prohibited" has reference "equally to such * * * game * * * coming from without the State as to that taken within the State." * * *

By the Federal Statute, the so-called Lacy Act (3 U. S., 188, Ch. 553, Sec. 5), it was provided:

"That all dead bodies, or any part thereof, of any * * * for-
"eign game * * * birds, the importation of which is prohib-
"ited, or the dead bodies, or parts thereof, of any wild * * *
"game * * * birds transported into any State, * * * or
"remaining therein for use, consumption or storage therein, shall
"upon arrival in such State * * * be subject to the operation
"and effect of the laws of such State * * * enacted in the
"exercise of its police powers to the same extent and in the same
"manner as though such * * * birds had been produced in
"such State, * * * and shall not be exempt therefrom by
"reason of being introduced therein in original packages or other-
"wise." * * *

Section 141 of the Game Law was enacted (Ch. 194, Laws 1902) subsequent to the Federal Statute quoted, and the question
19 here is now free from any suggestion of any interference with the commerce regulations of the National Government.

In the matter of Raher (140 U. S., 545, 564) the United States Supreme Court held, as to a statute of like tenor as the Lacy Act, though relating to a different subject matter, that Congress had "removed the impediment to the enforcement of the State laws in respect to imported packages, created by the absence of a specific utterance on its part."

The reasoning in People *vs.* Bookman (180 N. Y., 1, 6) is controlling upon these applications. It will be seen that the holding in that case in the Appellate Division (95 App. Div., 469, 473) involved the constitutionality of Section 28 in so far as it related to

imported birds possessed during the close season, and that was one of the questions discussed and passed upon in the Court of Appeals. The opinion in the last named Court is not *obiter dictum,* and it must be respected here.

Writs quashed and petitioners remanded.

20 *Stipulation.*

Supreme Court of New York, County of Kings.

THE PEOPLE OF THE STATE OF NEW YORK *ex Rel.* AUGUST SILZ
against
HENRY HESTERBERG, Sheriff of the County of Kings.

Pursuant to Section 3301 of the Code of Civil Procedure we hereby stipulate that the foregoing are true copies of the notice of appeal, the order appealed from and the papers used upon the motion below, on file in the office of the Clerk of the County of Kings, and of the whole thereof, and certification is hereby waived in pursuance of Section 1353 of the Code of Civil Procedure.

Dated July —, 1905.

FINCH & COLEMAN,
Atty's for Petitioner August Silz.
JOHN F. CLARKE,
District Attorney of Kings County.

21 At a term of the Appellate Division of the Supreme Court held in and for the Second Judicial Department at the Borough of Brooklyn, on the 29th day of November, 1905.

Present:

Hon. Michael H. Hirschberg, Presiding Justice.
Hon. John Woodward,
Hon. Almet F. Jenks,
Hon. Adelbert P. Rich,
Hon. Nathan L. Miller, Justices.

THE PEOPLE OF THE STATE OF NEW YORK *ex Rel.* AUGUST SILZ,
Appellant,
against
HENRY HESTERBERG, Sheriff of the County of Kings, Respondent.

The above named August Silz, the relator in this proceeding, having appealed to the Appellate Division of the Supreme Court from an order of the Supreme Court entered in the office of the Clerk of the County of Kings on the 16th day of June, 1905, quashing a writ of *habeas corpus* herein, etc., and the said appeal having been argued by Mr. Edward Lauterbach, of counsel for the appellant, and
22 by Mr. Alexander T. Mason, Deputy Attorney General of counsel for the respondent, and due deliberation having been had thereon,

It is hereby ordered that the order so appealed from be and the same hereby is reversed and petitioner discharged. Opinion by Woodward, J., Hirschberg, P. J., and Rich, J., concur. Miller, J., reads for affirmance, with whom Jenks, J., concurs.

Enter,

M. H. HIRSCHBERG, *P. J.*

Supreme Court, Appellate Division, Second Judicial Department.

CLERK'S OFFICE, BOROUGH OF BROOKLYN, N. Y.

I, John B. Byrne, Clerk of the Appellate Division of the Supreme Court in the Second Judicial Department, do hereby certify that the foregoing is a copy of the order made by said Court upon the appeal in the above entitled action or proceeding, and entered in my office on the 29th day of November, 1905, and that the original case or papers upon which said appeal was heard are hereunto annexed.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court, at the Borough of Brooklyn, this 29th day of November, 1905.

JOHN B. BYRNE, *Clerk.*

23 Appellate Division, Supreme Court, Second Department.

THE PEOPLE OF THE STATE OF NEW YORK *ex Rel.* AUGUST SILZ,
Appellant,
vs.
HENRY HESTERBERG, Sheriff of the County of Kings, Respondent.

SIR: *Please take notice* that the above named respondent hereby appeals to the Court of Appeals from an order of the Appellate Division of the Supreme Court for the Second Judicial Department, entered in the office of the Clerk of the Appellate Division, Second Department, on the 29th day of November, 1905, and entered in the office of the Clerk of the County of Kings on the 4th day of December, 1905, which order so entered herein reversed an order of the Supreme Court entered herein in the office of the Clerk of the County of Kings on the 16th day of June, 1905. And the respondent hereby appeals from each and every part of said order.

Yours, etc.,
JOHN F. CLARKE,
District Attorney, Attorney for Appellant Henry Hesterberg, Sheriff, etc., County Court House, Brooklyn, N. Y.

To Julius M. Mayer, Esq.,
Attorney General.
Messrs. Finch & Coleman,
Attorneys for August Silz.
Edward Kaufman, Esq.,
Clerk of the County of Kings.
William H. Shankland, Esq.,
Clerk of the Court of Appeals.

24 Supreme Court, Appellate Division, Second Judicial Department.

Hon. Michael H. Hirschberg, Presiding Justice,
Hon. John Woodward,
Hon. Almet F. Jenks,
Hon. Adelbert P. Rich,
Hon. Nathan L. Miller, *Justices.*

THE PEOPLE OF THE STATE OF NEW YORK *ex Rel.* AUGUST SILZ, Appellant,

against

HENRY HESTERBERG, Sheriff of the County of Kings, Respondent.

Appeal by the relator from an order of the Supreme Court, entered in the office of the Clerk of the County of Kings on the 16th day of June, 1905, quashing a writ of *habeas corpus.*

Edward Lauterbach (Edward R. Finch and John Burlington Coleman with him on the brief), for the appellant.

Julius M. Mayer, Attorney General (Alexander T. Mason, Deputy Attorney General, with him on the brief), for the respondent.

WOODWARD, *J.:*

There is no dispute about the facts in this case. One
25 August Silz, on the 30th day of March, 1905, had in his possession in the County of Kings one imported golden plover which was lawfully taken, killed and captured in England during the open season for such game there, and thereafter sold and consigned to Silz in New York City by a dealer in game in London, England, and at the same time he had in his possession one imported blackcock, a bird lawfully taken and killed in Russia and consigned to the said Silz by the same London dealer. These birds, it is conceded, were duly imported by Silz in accordance with the provisions of the tariff laws and regulations in force, through the Custom House in New York City, during the open season for plover and grouse in the State of New York. It is admitted that these particular birds are entirely different varieties of game birds from the game birds known as plover and grouse in the State of New York, and from any bird native to the State of New York, or to America; that they are different in form, size, color and markings from the game birds known as plover and grouse in the State of New York from any American bird, and can be easily and readily distinguished from such plover and grouse found in New York State and from any bird native to America, both with their feathers on and after they are plucked. It is likewise conceded that such birds were and are staple, sound, wholesome and valuable articles of food, and are in constant use as such, and that they are recognized and staple articles of commerce between the different countries of Europe and the United States of America, and were of the fair market value of one dollar

and a half. The only question presented upon this appeal is whether
the possession of these birds, under these circumstances, con-
26 stituted a crime under the provisions of Sections 106, 108,
119 and 141 of the Forest, Fish and Game Law as amended by chapter 588 of the Laws of 1904.

In principle, the exact question here presented was before the court in People *vs.* Buffalo Fish Co. (30 Misc., 130), and Mr. Justice Lambert, after reviewing the authorities, said: "The principle laid down by the case referred to clearly established the right of the defendant to import the fish in question into the State of New York as a purchaser and importer, and in the exercise of such right conferred by the Federal Government, it was not within the power of the Legislature to make the possession of the property thus imported unlawful. Possession is a necessary incident to the right of importation, and to the right of property imported. Possession and the right of sale is the intended consequence of the right of importation. It would as effectually destroy the privilege of importation to make the intended consequence thereof unlawful, as to prohibit importation itself. Applying the rules laid down in the cases discussed to the admitted facts, that the fish in question were imported from the Dominion of Canada, and a duty had been paid for such privilege under the Dingley Act, some of which were in the hands of the importer for shipment and the remainder in its possession for the purposes of sale, it is clear that the statute of this State making such possession unlawful is in conflict with the general power of Congress to regulate commerce between foreign nations and the several States, and to the extent that it attempts to levy tribute upon the custodians of these fish, whether by means of taxation or a penalty for having them in possession, it is null and void." Continuing a review of
authorities, the same learned jurist sums up as follows: "This
27 being the law of the land, that the importer acquires a right,
not only to bring the articles into the country, but to mix them with the common mass of property, the fish imported by this defendant, became, by reason of such importation, absolute property in the hands of the importer, as well as all who might take title under them, and it is an abuse of the police power which cannot be justified by any sound process of reasoning to say that the Legislature may make it a crime, and subject the owner of this lawfully acquired property to penalties for merely having the property in his possession. It is conceded, of course, that if these fish were diseased, or had remained exposed to the elements until they were unfit for food, and constituted a menace to the public health, the State would have the right to interpose its police powers and prevent the sale."

This case was considered by the Appellate Division in the Fourth Department, where it was affirmed on the opinion of the Court below (45 App. Div., 631), and was then taken to the Court of Appeals where it was affirmed by a divided Court, O'Brien, J., writing. After a careful review of the questions submitted, the learned Court said: "Admitting, for the purposes of the Argument, that the statute in question means just what the plaintiff's counsel claims for it, the important fact still remains that Congress has permitted the defend-

ant to import fresh fish upon payment of certain duties. It has paid the duties and complied with the Federal regulations, but when the article is brought here the State steps in and forbids the defendant to have it in its possession, and, of course, forbids the sale. This creates a direct conflict between the regulations of Congress and those of the State, and, consequently, the latter must yield to the
28 former. The State had no power to extend its police legislation to such a transaction and, of course, had no power to forbid what Congress had expressly permitted."

It appears to be conceded upon this appeal that the People *vs.* Buffalo Fish Co. (*supra*) would be controlling, were it not for certain statutory provisions which have been enacted since the decision in that case, and it is contended that the Court of Appeals in People *vs.* Bootman (180 N. Y., 1) has finally determined the question here presented in favor of the respondent. As we read that case, however, it does not appear to question the law of the Buffalo Fish Company case, in so far as it decided that fish brought into this country from foreign lands, under the provisions of the custom laws, could be possessed and sold without regard to State statutes. In fact, the decision follows the Buffalo Fish Company case, and holds that game birds, grouse, quail, etc., which are not killed in the State of New York, but which were killed in sister States and transported into this State in November, 1909, and which were in the possession of the defendants in June, 1901, were not unlawfully possessed, and that the owners were not, therefore, subject to the penalties attempted to be imposed. After determining the only question then before the Court, the learned jurist writing went into discussion of what the law might be, under statutory provisions, since enacted, and it was pointed out that "it was held by a majority of the learned justices of the Appellate Division that the Legislature has no power to make the possession of imported game unlawful, as it would violate the provision of our State Constitution relating to the protection of property," and it was this determination of the Appellate Division
29 in the First Department (95 App. Div., 469) which the Court disapproved, and not the decision of Mr. Justice Lambert and the Appellate Division in the Fourth Department, that the act was unconstitutional and void as interfering with the commerce clause of the Federal Constitution, in so far as it attempted to deal with articles imported under the provisions of the customs laws of the nation. "While it is our duty," say the Court in the Bootman case (*supra*) "to affirm the judgment of the Appellate Division, we have felt constrained to consider the constitutional question discussed by that learned Court, lest the conclusion announced should be regarded as a precedent and result in evil."

The legislation under which it is claimed the police powers of the State have been enlarged so as to make it a crime for a man who has lawfully possessed himself of property, having all of the attributes of properly outside of this State, and in no wise a menace to the morals or health of the community, to bring it into his possession within this jurisdiction, is found in 31 United States Statutes at Large, chapter 553, and in section 141 of the Forest, Fish and

Game Law, as amended by Chapter 588 of the Laws of 1904. The Federal statute provides, in Section 5, that "all dead bodies, or parts thereof, of any foreign game animals, or game or song birds, the *importation of which is prohibited,* or the dead bodies, or parts thereof, of any wild game animals, or game or song birds transported into any State or Territory, or remaining therein for use, consumption, sale, or storage therein, shall, upon arrival in such State or Territory, be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such animals
30 or birds had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise." The State statute appears to have been designed to be in harmony with this provision of the Federal statute, for it is provided that "Whenever in this act the possession of fish or game, or the flesh of any animal, bird or fish, is prohibited, reference is had equally to such fish, game or flesh coming from without the State as to that taken within the State."

But what has either of these provisions to do with the conceded facts in the case now before us? Without going into an analysis of the statutes, it is plain that in so far as the Federal statute has any bearing whatever, it must relate to inter-state and not to foreign commerce, and we are dealing with a conceded article of foreign commerce,—with an article the importation of which is not prohibited. Articles which may be imported under the customs laws and regulations of the United States are within the exclusive jurisdiction of Congress, and it has not attempted, in the so-called Lacy Act, to place them under the police regulations of the States. All game animals or birds, "the importation of which is prohibited" by the customs laws or regulations of the United States are placed upon the same footing as "the dead bodies or parts thereof of any wild animals, or game or song birds, transported into any State or Territory," the word "transported" being used in the sense of shipped from one State to another, but this, by necessary implication, excludes from State control those game birds, etc., the importation of which is not prohibited. As to these, Congress has provided for their importation, and, as O'Brien, J., so well said in People *vs.* Buffalo Fish Co. (*supra*): "The State had no power to extend its
31 police legislation to such a transaction, and, of course, had no power to forbid what Congress had expressly permitted."

Whatever may be our opinion as to the question discussed outside of the scope of the decision made in the Bootman case (*supra*), it certainly does not overrule the Buffalo Fish Company case (*supra*) in so far as that case held that fish imported under the tariff laws and regulations of the United States were not subject to State control, except as they might become so by reason of some inherent vice in the fish themselves; and as the case now before us cannot be distinguished in principle from the latter, it follows that there should be a reversal of the order appealed from.

Order appealed from reversed and petitioner discharged.

Supreme Court, Appellate Division, Second Judicial Department.

Hirschberg, P. J., Woodward, Jenks, Rich, and Miller, JJ.

THE PEOPLE OF THE STATE OF NEW YORK *ex Rel.* AUGUST SILZ, Appellant,
against
HENRY HESTERBERG, Sheriff of the County of Kings, Respondent.

Appeal by the relator from an order of the Supreme Court,
32 entered in the office of the Clerk of the County of Kings on the 16th day of June, 1905, quashing a writ of *habeas corpus*.

Edward Lauterbach (Edward R. Finch and John Burlinson Coleman with him on the brief), for the Appellant.

Julius M. Mayer, Attorney General (Alexander T. Mason, Deputy Attorney General, with him on the brief), for the Respondent.

MILLER, *J.*:

I dissent. Evidently the imprisonment which is the subject of inquiry in this proceeding was procured for the purpose of enabling the petitioner to present the legal questions involved upon his own statement of facts, and it is urged that the allegation in the complaint that the plover and grouse in question "can be easily and readily distinguished from such plover and grouse found in the State of New York, and from any American bird, both with their feathers on and after they are plucked and after they are cooked and ready for the table," prevents the application of section 141 of the Forest, Fish and Game Law, added by chapter 194 of the Laws of 1902, which, so far as material, provides, "Whenever in this act the possession of fish, or game, or the flesh of any animal, bird or fish, is prohibited, reference is had equally to such fish, game or flesh coming from without the State as to that taken within the State," and the contention is that said section applies only to fish and game identical in form, shape, size, color and markings to the fish and game found in this State. By section 28 of the Forest, Fish and Game Law (chapter 20, Laws of 1900, as amended by chapter 317, Laws of 1902) the sale or possession of "grouse" during the close-season is prohibited; by section 30 of said law, as amended
33 by chapter 588, Laws of 1904, the possession of plover from January 1st to August 15th is prohibited; and by section 140 of said law "grouse" is defined as including "ruffed grouse, partridge, and every member of the grouse family;" in effect, therefore, and practically in express terms, the Legislature has prohibited during the times stated the possession of plover and of every member of the grouse family, whether taken within the State or coming from without the State. It is difficult to see how the legislative intent could

have been more clearly expressed, for surely it is not necessary for the Legislature to say expressly that it intends to mean just what it says. But the argument is made that, because said section 141 was added after the decision in People *vs.* Buffalo Fish Co. (164 N. Y., 93), which construed the act of 1900 as applying only to fish and game taken within the State, the word "such" in said section 141 should be construed as referring only to fish and game identical in size, etc., to that found in the State. The argument is ingenious rather than convincing. It is perfectly apparent that the amendment of 1902 was declaratory of its previous intention, which the Legislature thought the Court of Appeals had misconceived, and in expressing that intention it must be supposed as intending to mean just what it said. It is matter of common knowledge that it is well nigh impossible to secure even a practical enforcement of laws like the one in question; and although it is said that the closing of our markets to game that can be distinguished from our own does not aid in the protection of our game, I can conceive, even assuming that "black cock" and "golden plover" can be distinguished from our own birds "when cooked," that a very small number of "black
34 cock" and "golden plover" might suffice to supply a very large demand for game in the New York markets. It is not our province to determine what measures should be adopted to secure an enforcement of the law, and the fact that we might regard the measures adopted by the Legislature as unnecessary or as too harsh furnishes no reason for construing a statute, that does not admit of construction, as we think the Legislature ought to have enacted it; it is our duty rather to give effect to the expressed intention of the Legislature unless it contravenes some organic law. The constitutional questions presented were fully considered by the Court of Appeals in People *vs.* Bootman (180 N. Y., 1). Judge Vann, speaking for every member of the Court, said: "That act" (referring to the so-called Lacy Act, 31 U. S. Statutes at Large, chapter 553) "provides in substance that foreign game, when transported into any State, shall be subject to the laws of that State, enacted in the exercise of its police powers, to the same extent as if such game had been produced in such State, and shall not be exempt therefrom by reason of importation in original packages. * * * That amendment" (referring to Laws of 1902, chapter 194) "when read in connection with the Lacy Act and the decisions of the Federal Courts, removes from the region of discussion the questions considered in the Buffalo Fish Co. case in relation to the application of the Forest, Fish and Game Law to imported game, which was decided, *and the effect of the commerce clause of the Federal Constitution, which, although discussed, was not decided.* (Italics are my own.) "* * * The action of Congress has taken away all questions of interstate commerce, so that the State can act with entire freedom and can prevent the shipment of game into or out of its own
35 territory; *and if game is imported, it can regulate or prohibit the sale thereof.*" (Italics are my own.) "Such provisions are warranted by the police power, and are not in conflict with either

the State or Federal Constitution." True, this discussion was not necessary to the decision, as the Court stated, but grave doubts on the constitutional questions had been created by the discussion in the Buffalo Fish Co. case and by the decision of the Appellate Division in the Bootman case. To set these doubts at rest and because of the public importance of the question, the Court of Appeals stated its views, and it cannot be assumed that this was done without a full and careful consideration of the subject. It seems to me, therefore, that further discussion in this Court is purely academic, and I should rest my vote on the authority of the Bootman case without further discussion were it not for the earnestness and ability with which counsel attempted to distinguish that case, and for the fact that we are not agreed on the question.

In the first place it is said that the Buffalo Fish Co. case was not overruled by the Bootman case, but that it is still authority for the proposition that the statute offends both the State and Federal Constitution. The answer is that it never was authority for any such proposition, and this without regard to the effect of the "Lacy Act;" three judges only assented to that proposition, three united in a vigorous and logical defense of the constitutionality of the act, and the concurrence of the seventh with the opinion of the majority was expressly limited to the point that the act was not applicable; thereby, by implication at least, agreeing with the minority on the constitutional question; and while the decision in the Bootman case upon the meaning of the act was controlled by the Buffalo Fish Co. case, the Court expressly stated that its decision was governed by the rule of *stare decisis*.

Next it is claimed that the peculiar wording of Section 5 of the Lacy Act presents a question not considered in the Bootman case, and that, therefore, the admitted facts of this case present a new question for consideration. Said Section 5 is as follows: "Section 5. That all dead bodies or parts thereof of any foreign game animals, or game or song birds, the importation of which is prohibited, or, the dead bodies, or parts thereof, of any wild game animals, or game or song birds transported into any State or territory, or remaining therein for use, consumption, sale, or storage therein, shall upon arrival in such State or territory be subject to the operation and effect of the laws of such State or territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such animals and birds had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise. This act shall not prevent the importation, transportation, or sale of birds or bird plumage manufactured from the feathers of barnyard fowl."

The argument is that the express reference to "foreign game animals, or game or song birds, the importation of which is prohibited," by necessary implication excludes from the effect of the statute all foreign game animals or birds, the importation of which is not prohibited, and that although the words "any wild game animals, or game or song birds," subsequently used in the section, are comprehensive enough to include foreign game animals or birds, the

meaning of these words is restricted by the word "trans-
37 ported," which means "shipped" from one State to another, and does not include an import. Reading the section without reference to its context, there seems to be much force in the first part of this argument, for it would seem that the foreign game animals or birds referred to were those the importation of which was prohibited by the act, and that, by expressly including them, all others were excluded. The importation of certain living animals and birds is prohibited by Section 2 of the act, as follows: "The importation of the mongoose, the so-called 'flying foxes' or friar bats, the English sparrow, the starling, or such other birds or animals as the Secretary of Agriculture may from time to time declare injurious to the interest of agriculture or horticulture, is hereby prohibited." It may be that the words "the importation of which is prohibited," in Section 5, should be interpreted as though the phrase read "the importation of which, if living, is prohibited by Section 2," and assuming this to be the correct construction of this phrase, the question is presented whether it limits the subsequent general expression so as to exclude therefrom all foreign wild game animals and birds the importation of which is not thus prohibited. Certainly the expression "*any* wild game animals, or game or song birds," includes foreign animals or birds, and there is no force in the argument based on the use of the word "transported," because that is not a correlative of the word "importation," it relates alike to the phrase "all dead bodies or parts thereof, of any foreign game animals," etc., and obviously means "carried," which is comprehensive enough to include both an import and a shipment from one State to another. The office of construction is to determine the legislative intent, and

when such intent is apparent, canons of construction, adopted
38 solely to determine what it is, must yield to it. Congress declared in the first section of the act that its purpose was to aid in the preservation, distribution, introduction and restoration of game and other wild birds, and the manner in which it effected this purpose was by supplementing State laws to the extent of removing any question as to their conflict with the commerce clause of the Federal Constitution. It evidently deemed the act an appropriate one by which to prohibit the importation of animals and birds deemed to be injurious to agriculture and horticulture. Our attention is not called to any other Federal Statute prohibiting the importation of game animals or birds, and if the application of Section 5 is to be limited to the foreign animals and birds the importation of which is prohibited by the act, we shall have difficulty in determining what harm the Congress thought dead mongoose, bats, sparrows and starling might inflict upon agriculture or horticulture, or exactly what aid in the enforcement of local laws would result from making their "dead bodies or parts thereof" subject to the operation and effect of said laws. The construction contended for would entirely defeat the declared purpose of the act. Obviously the sole purpose of making game taken without the State subject to the laws of the State is to prevent the sale of game taken within the State under the guise of game taken from without, and if foreign game can be utilized for

the purpose, it would be senseless as well as useless to prohibit game from other States. As the expression "any wild game animals, or game or song birds transported into any State or Territory," includes foreign game, and as that construction gives effect to the declared purpose of the act, while any other defeats such purpose, such
39 construction should be adopted, whatever other parts of the act may be thought to mean.

But even if this statute, passed to accomplish a very beneficial purpose, can be so emasculated as to defeat such purpose, I should still vote to affirm this order upon the reasoning of Judge Gray in the Buffalo Fish Co. case, and of Judge Vann in the Bootman case. One question must certainly be deemed removed from the realm of controversy, viz., that the enactment of laws for the preservation of game is a legitimate exercise of the police power of the States. (Geer *vs.* State of Connecticut, 161 U. S., 519; Phelps *vs.* Racey, 60 N. Y., 10; Lawton *vs.* Steele, 119 N. Y., 226; 152 U. S., 133; Commonwealth *vs.* Savage, 155 Mass., 278; Roth *vs.* State, 51 Ohio, 210; Magner *vs.* People, 97 Ill., 320; Merritt *vs.* People, 48 N. E., 325; Stevens *vs.* People, 89 Md., 669; State *vs.* Randolph, 1 Mo., 15; State *vs.* Judy, 7 Mo., 524; State *vs.* Farrell, 23 Mo., 176; *Ex parte* Maier, 103 Cal., 476; State *vs.* Schuman, 58 Pac. Rep., 661.) All of the cases cited *supra*, except Geer *vs.* State of Connecticut and Lawton *vs.* Steele, upheld the validity of statutes whose prohibition extended alike to game taken without as well as within the State in which the statute was enacted. Having settled the question that the subject is a proper one for the exercise of the police power, the conclusion would seem to be inevitable that the necessity for the exercise of such power and the means of making such exercise effective are solely for the Legislature, and that in selecting means legitimately tending to accomplish its purpose the Legislature does not offend either the State or Federal Constitution. No one disputes the right of the State to legislate respecting purely internal affairs, and so far as the commerce clause of the Federal Con-
40 stitution is concerned, this right does not rest upon the police power; it is only when the legislation affects interstate or foreign commerce that it must be sustained if at all by resort to the police power reserved to the States. No one disputes that the individual holds his property subject to the legitimate exercise of the police power, and in this case it may be added that the petitioner acquired the property with the knowledge, with which he was at least chargeable, of the circumstances under which he could possess it. Concededly the subject of this legislation was a proper one for the exercise of the police power, the means adopted certainly tend to accomplish the object in view, and we cannot say that the object of the statute has been lost sight of or that the act in its essen-ials is anything but an act passed in the exercise of the police power to preserve the game of the State; and the fact that commerce may be remotely affected or that the dominion of an individual over his property may be controlled does not bring the act within the prohibition of either the State or Federal Constitution, unless while asserting the power we are to deny the right to exercise it effectively.

As I understand the decisions respecting the commerce clause of the Constitution, the inquiry in each case is whether the particular act is essentially a regulation of commerce, or a legitimate exercise of the police power; if the former, merely calling it an act passed in the exercise of the police power does not save it from the prohibition of the Constitution; if the latter, the mere fact that commerce may be affected does not make the act a regulation of commerce within the meaning of the Constitution. The line of demarkation between the power of the State and the prohibition of the Constitution
41 is of necessity so indefinite that the Court must determine in respect to each as it arises on which side of the line it falls, and there certainly is no case in the Supreme Court of the United States so nearly in point as Geer *vs.* State of Connecticut (*supra*). The statute there passed upon prohibited the possession for the purpose of transportation beyond the State of Connecticut of birds lawfully killed within the State. The plaintiff, in error, had become the possessor of the birds in question after they had become an article of commerce. It is true, as pointed out by Judge O'Brien in the Buffalo Fish Co. case, that one of the grounds of the decision of the Supreme Court was that wild game belonged to the people in common and that, therefore, the State could qualify the ownership by any person reducing such game to possession, but it is equally true that the Court placed its decision upon the distinct ground of the undoubted right of the State in the exercise of its police power to pass laws for the preservation of game, even though interstate commerce was remotely affected, and Mr. Justice White, speaking for a majority of the Court, prefaced the discussion of this question with the following statement: "Aside from the authority of the State, derived from the common ownership of game and the trust for the benefit of its people, which the State exercises in relation thereto, there is another view of the power of the State in regard to the property in game, which is equally conclusive," and in discussing the question, he said: "The exercise by the State of such power, therefore, comes directly within the principle of Plumley *vs.* Massachusetts, 155 U. S., 461, 473," which was a case involving a sale in the original package of oleomargarine, colored in imitation of butter, in violation of a statute of the State of Massa-
42 chusetts. In the Geer case, the statute in terms prohibited interstate commerce in game lawfully reduced to possession in the State of Connecticut. The statute in question does not in terms or effect prohibit interstate or foreign commerce. So far as the facts in the case at bar are concerned, the importation of the birds by the petitioner was perfectly lawful and his possession of them would have continued lawful had he observed the statute by giving the bond required. It is claimed that this case is controlled by Leisy *vs.* Hardin (135 U. S., 100) and that Plumley *vs.* Massachusetts (155 U. S., 461) is not applicable; even then the facts of this case do not bring it within the prohibition of the commerce clause for the reason that there is no question here of possession in the original package; on the contrary, it must be assumed that these birds had become part of the mass of the property of the State subject to

the laws passed by the State in the conduct of its purely internal affairs, because if the petitioner relies upon any exception to save him from the operation of the statute, even assuming that there be such an exception, that is a matter of defense which need not have been negatived in the complaint, and Lesy *vs.* Hardin (*supra*) goes no farther than to hold that it was not competent in that particular case for the State to prohibit the sale in the original package, and such was the case of Schollenberger *vs.* Pennsylvania (171 U. S., 4), construing an act which was essentially a regulation of commerce. It is said the right to import carries with it the right to sell, and the right to purchase of the importer must carry a like right to sell, and so on *ad infinitum*, whatever form the property may assume and by whomsoever it may become possessed. Obviously there must
43 come a time when the property introduced into the State becomes so mingled with the mass of property of the State as to be subject to laws passed either for taxation or in the regulation of its purely internal affairs. The line must be drawn somewhere and somewhat arbitrarily, and as drawn by the Supreme Court of the United States it is where the article loses its distinctive character as an import or as an article of interstate commerce, to wit, when it ceases to retain the form in which it was transported into the State, when the original package is broken. (Brown *vs.* State of Maryland, 12 Wheaton, 419, and cases cited *supra*). I vote to affirm the order.

Stipulation.

Pursuant to section 3301 of the Code of Civil Procedure we hereby stipulate that the foregoing are true copies of the Notice of Appeal to the Appellate Division, Order appealed from, and the papers used upon the motion at Special Term on file in the office of the Clerk of the County of Kings, and of the whole thereof, and also of the Notice of Appeal to the Court of Appeals, Order of the Appellate Division on appeal from the order and opinions therein, and all papers used therein, and of the whole thereof, and certification is hereby waived in pursuance of section 1353 of the Code of Civil Procedure.

Dated, December 30, 1905.

FINCH & COLEMAN,
Attorneys for Petitioner, August Silz.
JOHN F. CLARKE,
District Attorney of Kings County.
JULIUS M. MAYER,
Attorney General.

STATE OF NEW YORK, *County of Kings, ss:*

I, Charles T. Hartzheim, Clerk of the County of Kings and Clerk of the Supreme Court of the State of New York in and for said County, (said Court being a Court of Record,) do hereby certify that I have compared the annexed with the original Records filed in my office and that the same is a true transcript thereof, and of the whole of such original.

In testimony whereof, I have hereunto set my hand and affixed the seal of said County and Court, this 27 day of Sept. 1907.

[Seal Kings County.]

CHAS. T. HARTZHEIM, *Clerk.*

O. K.
A. Cr.

44 COURT OF APPEALS, *State of New York, ss:*

Pleas in the Court of Appeals, held at the Capitol, in the City of Albany, on the 27th day of February, in the year of our Lord one thousand nine hundred and six, before the Judge of said Court.

Witness the Hon. Edgar M. Cullen, Chief Judge, Presiding.

W. H. SHANKLAND, *Clerk.*

Remit-itur, February 28th, 1906.

45 THE PEOPLE OF THE STATE OF NEW YORK *ex Rel.* AUGUST SILZ, Respondent,
against
HENRY HESTERBERG, as Sheriff of the County of Kings, Appellant.

Be it remembered, that on the 5th day of January in the year of our Lord one thousand nine hundred and six, Henry Hesterberg, as Sheriff etc. the appellant in this proceeding came here into the Court of Appeals by John F. Clarke, District Attorney, his attorney, and filed in the said Court a notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Second Judicial Department.

And August Silz the respondent in said proceeding afterwards appeared in said Court of Appeals by Finch & Coleman, his attorneys.

Which said Notice of Appeal and the return thereto, filed as aforesaid are hereunto annexed.

Whereupon the said Court of Appeals having heard this cause argued by Mr. Julius M. Mayer, Attorney General of Counsel for the Appellant and by Edward Lauterbach of Counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the Order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is re-
46 versed and relator remanded to custody.

And it is further ordered that the record aforesaid and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

Therefore, it is considered that the said Order be reversed and relator remanded to custody as aforesaid,

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid by them given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York, before the Justices thereof, according to the form of the Statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court before the Justices thereof etc.

W. H. SHANKLAND,
Clerk of the Court of Appeals of the State of New York.

COURT OF APPEALS CLERK'S OFFICE,
ALBANY, *February 28th*, 1906.

I hereby certify that the preceding record contains a correct transcript of the proceedings in the Court of Appeals, with the papers originally filed therein attached thereto.

O. K.
A. Cr.
[SEAL.] W. H. SHANKLAND, *Clerk.*

STATE OF NEW YORK, *County of Kings, ss:*

I, Charles T. Hartzheim, Clerk of the County of Kings, and Clerk of the Supreme Court of the State of New York in and for said County, (said Court being a Court of Record,) do hereby certify that I have compared the annexed with the original transcript filed in my office July 27, 1906, and that the same is a true transcript thereof, and of the whole of such original.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said County and Court, this 27 day of Sept. 1907.

[Seal Kings County.]
CHAS. T. HARTZHEIM, *Clerk.*

47 [Endorsed:] Court of Appeals, State of New York. People of the State of New York, Pl'ff-resp'd't, against Henry Hesterberg, as Sheriff of the County of Kings, Def't-app'l't. Order of Reversal.

48 At a Special Term of the Supreme Court held in and for the County of Kings at the County Court House in said County on the 27th day of July 1906.

Present: Hon. Truman C. White, Justice.

PEOPLE OF THE STATE OF NEW YORK *ex Rel.* AUGUST SILZ
against
HENRY HESTERBERG, Sheriff of the County of Kings.

The above named August Silz, having been arrested and restrained of his liberty and confined in the custody of the above named Henry Hesterberg, Sheriff of the County of Kings, in the County Jail in said County, for an alleged violation of the provisions of Chapter 20

of the Laws of 1900 of the State of New York, known as the Forest, Fish and Game Law; and said August Silz having obtained a Writ of *Habeas Corpus*, requiring said Henry Hesterberg, Sheriff of the County of Kings, to produce the body of said August Silz at the Court House in Kings County on the ground that the imprisonment and detention of the said August Silz was illegal and void for the reason that the provisions of Chapter 20 of the Laws of 1900 of the State of New York, in so far as they relate to the said August Silz and his possession, in the County of Kings of imported black cock and golden plover caught and killed in the different countries of Europe and duly imported into the County of Kings as set
49 forth in the moving papers, are unconstitutional and void in as much as they violate the provisions of Amendment 14 of the Constitution of the United States in that they operate to deprive persons of their liberty and property without due process of law; and that further they are unconstitutional and void in as much as they violate the provisions of Article 1 Section 8 of the Constitution of the United States, in that they constitute an unjustifiable interference with and regulation of interstate and foreign commerce; and thereafter the said Henry Hesterberg, Sheriff of the County of Kings, having made his return to said Writ of *Habeas Corpus;* and the said August Silz having demurred to said return; and thereafter a hearing having been duly had on the return day of said Writ of *Habeas Corpus*, and the said Writ having been quashed and dismissed; and an order having been made remanding the said August Silz to the custody of the Sheriff of Kings County; and an appeal having been taken from such order of the Supreme Court at Special Term to the Appellate Division of the Supreme Court in the Second Department; and said Appellate Division having decided that the provisions of the said Forest, Fish and Game Law were unconstitutional and void in so far as they relate to the said August Silz in the possession of blackcock and golden plover as aforesaid, in as much as they violate the provision of the Constitution of the United States as hereinbefore set forth; and an order having been made reversing the said order of the Special Term and discharging from custody the said August Silz, and a further appeal having been taken to the Court of Appeals of the State of New York from such determination of the Appellate Division in the Second Department, and the said
50 Court of Appeals having decided that the provisions of the said Chapter 20 of the Laws of 1900 do not violate any of the provisions of the Constitution of the United States as hereinbefore set forth.

And this proceeding having been brought on upon the remittitur herein sent down from the Court of Appeals and now filed in this Court, by which remittitur it appears that an appeal was taken by Henry Hesterberg, Sheriff of the County of Kings, to the said Court of Appeals from the order of the Appellate Division of the Supreme Court discharging the said August Silz from the custody of the said Henry Hesterberg, Sheriff of the County of Kings, and that said order of the Appelate Division has been reversed on the ground that the provisions of Chapter 20 of the Laws of 1900 do not in anywise

contravene the provisions of the Constitution of the United States as herein set forth; and that the said August Silz should be remanded to the custody of the said Henry Hesterberg, Sheriff of the County of Kings, and the record and proceedings having been directed by said Court of Appeals to be remitted to this Court, and this Court directed to enforce the said order of the Court of Appeals according to Law,

Now, therefore, on motion of John F. Clarke, Esq., District Attorney of Kings County, it is hereby

Ordered, that the said order of the Court of Appeals be and the same her-by is made the order of this Court and the said August Silz be remanded to the custody of Henry Hesterberg, Sheriff of the County of Kings.

Granted July 27, 1906.

O. K.

A. Cr.

CHARLES T. HARTZHEIM, *Clerk.*

Ent'r.

W.

STATE OF NEW YORK, *County of Kings*, ss:

I, Charles T. Hartzheim, Clerk of the County of Kings, and Clerk of the Supreme Court of the State of New York in and for said County, (said Court being a Court of Record,) do hereby certify that I have compared the annexed with the original Order filed in my office July 27, 1906, and that the same is a true transcript thereof, and of the whole of such original.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said County and Court, this 27 day of Sept. 1907.

[Seal Kings County.]

CHAS. T. HARTZHEIM, *Clerk.*

50½ [Endorsed:] New York Supreme Court, Kings County. People of the State of New *ex rel.* August Silz against Henry Hesterberg, Sheriff of the County of Kings. Order making order of the Court of Appeals order of the Supreme Court. Finch & Coleman, attorneys for relator, 32 Nassau street, New York city.

SIR: Please take notice that the within is a copy of a — this day duly entered in the office of the clerk of ——.

Dated —— — 190–.

Yours, etc.,

FINCH & COLEMAN,
Attorneys for ——.

Office and post office address 32 Nassau street, borough of Manhattan, New York city.

To —— —— att'y for ——.

51 STATE OF NEW YORK, *County of Kings, ss:*

I, Charles T. Hartzheim, Clerk of the County of Kings, and of the Supreme Court of the State of New York for the said County of Kings, by authority of the annexed Writ of Error which was served upon me on the 4th day of November 1907 and in obedience thereto do hereby certify that the foregoing pages numbered from 1 to 50 inclusive contain a true and complete transcript of the record and proceedings had in said Court in the suit of the People of the State of Nw York *ex rel.* August Silz against Henry Hesterberg, Sheriff of the County of Kings mentioned in the said Writ of Error as the same remain of record and on file in my office, and that annexed hereto is the petition for the said Writ of Error, the Citation to the said Writ *in* Error with proof of service of the same, the said Writ of Error served on me, and a copy of the bond; and also a duly authenticated copy of the opinion of the Court of Appeals of the State of New York rendered in said suit.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed at my office in the City of New York, County of Kings, and State of New York, on the 19th day of November 1907.

[Seal Kings County.]

CHAS. T. HARTZHEIM, *Clk.*

52 In the Supreme Court of the United States.

THE PEOPLE OF THE STATE OF NEW YORK *ex Rel.* AUGUST SILZ,
Plaintiff-in-Error,
against
HENRY HESTERBERG, Sheriff of the County of Kings, Defendant-in-Error.

To the Honorable Rufus W. Peckham, Justice of the Supreme Court of the United States:

And now comes August Silz, by Edward R. Finch and John B. Coleman his attorneys, and complains that in the records and proceedings and also in the rendition of a final order in the proceeding entitled "The People of the State of New York *ex rel.* August Silz against Henry Hesterberg, Sheriff of the County of Kings," which is in the Supreme Court of the State of New York, for the County of Kings, on a remittitur of the Court of Appeals of the State of New York, being the highest Court of Law and equity of the State of New York, in which a decision could be had, remitting to the said Supreme Court, for the County of Kings, the record in said proceeding and ordering that an order of the Appellate Division of the Supreme Court, Second Department, dated the 29th day of November, 1905, be reversed, and that the said August Silz be remanded to the custody of the said Henry Hesterberg, Sheriff of the County of Kings, which order of the Appellate Division of the Supreme
53 Court, Second Department, aforesaid reversed an order of the Supreme Court of the State of New York, entered in the office of the Clerk of the County of Kings, on the 16th day of June,

1905, dismissing a Writ of *Habeas Corpus* obtained in behalf of the relator on the 7th day of April, 1905, which said remittitur of the Court of Appeals of the State of New York directed that the Supreme Court of the State of New York aforesaid enforce the said order of the Court of Appeals of the State of New York according to law; upon which direction an order of the Supreme Court of the State of New York was entered in the office of the Clerk of the County of Kings on the 27th day of July, 1906, making the said order of the Court of Appeals of the State of New York, the order of the Supreme Court of the State of New York, and remanding said August Silz to the custody of Henry Hesterberg, Sheriff of the County of Kings, wherein was drawn in question the validity of the provisions of Chapter 20 of the laws of 1900 of the State of New York, known as the Forest, Fish, and Game Law, so far as they relate to the said August Silz and his possession in the County of Kings, of imported blackcock and golden plover caught and killed in the different countries of Europe and duly imported into the County of Kings, as set forth in the moving papers; and which said Forest, Fish, and Game Law provided that the violation of the said provisions thereof should be deemed a misdeamor and punishable as such by fine or imprisonment or both; for an alleged violation of which provisions of the said Forest, Fish, and Game Law, the said August Silz was imprisoned, and there was drawn in question the validity of and the authority and jurisdiction exercised under the provisions of the Forest, Fish, and Game Law aforesaid, so far as they relate to the said August Silz and his possession in the
54 County of Kings, of imported blackcock and golden plover caught and killed in the different countries of Europe and duly imported into the County of Kings, as set forth in the moving papers; upon the ground that such provisions are repugnant to the Constitution of the United States, and the decision of said Court of Appeals of the State of New York and of said Supreme Court of the State of New York as set forth in the said order of the Supreme Court of the State of New York, entered in the office of the Clerk of the County of Kings on the 27th day of July, 1906, on the remittitur of the Court of Appeals of the State of New York, as aforesaid, was in favor of the validity of the said provisions of the Forest, Fish, and Game Law aforesaid, and the authority and jurisdiction exercised thereunder, all of which appears in the record of said proceedings, and manifest errors have happened to the great damage of the said August Silz as aforesaid.

Wherefore, the said August Silz by Edward R. Finch and John B. Coleman, his attorneys, as aforesaid prays for the allowance of a Writ of Error and such other proceedings as may cause the said errors to be corrected by the Supreme Court of the United States.

Dated, New York, October 29th, 1907.

EDWARD R. FINCH,
JOHN B. COLEMAN,
Attorneys for August Silz, Petitioner.

Office & Post Office Address, 32 Nassau Street, Borough of Manhattan, City of New York.

55 [Endorsed:] 60/381. Supreme Court of the United States. The People of the State of New York *ex rel.* August Silz, Plaintiff-in-error, against Henry Hesterberg, Sheriff of the County of Kings, Defendant-in-error. Petition for Writ of Error. Edward R. Finch and John B. Coleman, attorneys for plaintiff-in-error, 32 Nassau street, New York city. Filed Nov. 4, 1907.

SIR: Please take notice that the within is a copy of a — this day duly entered in the office of the clerk of ——.

Dated —— — 190–.

Yours, etc., FINCH & COLEMAN,
Attorneys for ——.

Office and post office address 32 Nassau street, borough of Manhattan, New York city.

To —— —— att'y for ——.

56 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the supreme court of the State of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of New York, for the County of Kings, on a remittitur from the Court of Appeals of the said State before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between the People of the State of New York, *ex rel.* August Silz and Henry Hesterberg, Sheriff of the County of Kings wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of
57 a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clauses of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said People of the State of New York *ex rel.* August Silz as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the

date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 30th day of October, in the year of our Lord one thousand nine hundred and seven.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by

R. W. PECKHAM,
Associate Justice of the Supreme Court of the United States.

58 [Endorsed:] E. 60/381. Supreme Court of the United States. The People of the State of New York *ex rel.* August Silz, Plaintiff-in-error, against Henry Hesterberg, Sheriff of the County of Kings, Defendant-in-error. Original. Writ of Error. Edward R. Finch and John B. Coleman, Attorneys for Plaintiff-in-error. Office & Post Office Address, 32 Nassau Street, New York City. Filed Nov. 4, 1907. 1905. No. 4343.

59 UNITED STATES OF AMERICA, *ss:*

To Henry Hesterberg, sheriff of the county of Kings, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the clerk's Office of the Supreme Court of the State of New York for the County of Kings in an action wherein the People of the State of New York, *ex rel.* August Silz is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Rufus W. Peckham, Associate Justice of the Supreme Court of the United States, this 30th day of October, in the year of our Lord one thousand nine hundred and seven.

R. W. PECKHAM,
Associate Justice of the Supreme Court of the United States.

Service of a copy of the above citation is hereby admitted this 7th day of November 1907.

WILLIAM S. JACKSON,
Attorney General of the State of New York,
By A. M. KARR.

60 UNITED STATES OF AMERICA,
Eastern District of New York, County of Kings, ss:

On this 7th day of November, in the year of our Lord one thousand nine hundred and seven, personally appeared James H. Proctor bofore me, the subscriber, Hector A. Robichon, a Notary Public of the State of New York, and makes oath that he delivered a true copy of the within citation to Henry Hesterberg, the defendant in error herein, at 59 Leaden Street, Borough of Brooklyn, City of New York, County of Kings, on the 6th day of November 1907. Deponent further swears that he knew the aforesaid Hesterberg to be the person mentioned in said citation.

JAMES H. PROCTOR,
Deputy U. S. Marshal, Eastern Dist. of N. Y.

Sworn to and subscribed the 7th day of November, A. D. 1907.

[Seal Hector A. Robichon, Notary Public,
Kings County, New York.]

H. A. ROBICHON,
Notary Public, Kings County.

UNITED STATES OF AMERICA,
Eastern District of New York, County of Kings, ss:

On this 7th. day of November in the year of our Lord one thousand nine hundred and seven personally appeared James H. Proctor before me the subscriber Hector A. Robichon a Notary Public of the State of New York and makes oath that he delivered a true copy of the within citation to Michael J. Flaherty, Sheriff of the County of Kings, State of New York, suc-essor to Henry Hesterberg, on the sixth day of November 1907 at the Kings County Court House, Borough of Brooklyn, City of New York, County of New York. Deponent further swears that he knew the aforesaid Flaherty to be the Sheriff of said Kings County.

JAMES H. PROCTOR,
Deputy U. S. Marshal, Eastern Dist. of N. Y.

Sworn to and subscribed the 7th day of November A. D. 1907.

[Seal Hector A. Robichon, Notary Public,
Kings County, New York.]

H. A. ROBICHON.
Notary Public, Kings County.

60/469
Filed Nov. 13, 1907.

Service of a copy of the within citation is hereby admitted this 13th day of November 1907.

JOHN F. CLARKE,
District Attorney, Kings County.

District Attorney's Office, Brooklyn, N. Y., Nov. 13, 1907.
1905 No. 4343

61 In the Supreme Court of the United States.

THE PEOPLE OF THE STATE OF NEW YORK *ex Rel.* AUGUST SILZ,
Plaintiff-in-Error,
against
HENRY HESTERBERG, Sheriff of the County of Kings, Defendant-in-Error.

And now comes the above named relator by his Attorneys and Counsel, Edward R. Finch and John B. Coleman, and respectfully represents that he feels himself to be aggrieved by the proceedings and final order made and entered herein by the Supreme Court of the State of New York in and for the County of Kings, on the 27th day of July, 1906, on a remittitur from the Court of Appeals of the State of New York, and assigns errors as follows, that is to say:

I. The said Court erred in holding and deciding that the relator was not entitled to a Writ of *Habeas Corpus* and relief prayed for in the petition and in remanding the relator to the custody of the defendant; and in affirming the order of the Supreme Court dismissing the Writ of *Habeas Corpus* and remanding the relator to the custody of the defendant.

II. The said Court erred in not ordering and adjudging that the order of the Supreme Court, dismissing the Writ of *Habeas Corpus*, be reversed in all things, and that the said relator be discharged from the cusody of the defendant.

62 III. The said Court erred in not holding and deciding ordering and adjudging that the order of the Appellate Division Second Department should be affirmed, which said order of the Appellate Division reversed the order of the Supreme Court and granted the Writ of *Habeas Corpus* and discharged the relator from the custody of the defendant.

IV. The said Court erred in holding and deciding, ordering and adjudging in favor of the validity of the provisions of Chapter 20 of the Laws of 1900 of the State of New York so far as they relate to the said August Silz and his possession in the County of Kings of imported grouse or blackcock and imported golden plover caught and killed in the different countries of Europe and duly imported, as set forth in the moving papers, erroneously construing the Act of Congress entitled "An Act to enlarge the powers of the department of agriculture, prohibit the transportation by interstate commerce of game killed in violation of local laws, and for other purposes," approved May 25, 1900, commonly known as the Lacey Act, as applicable thereto.

V. The said Court erred in deciding in favor of the validity of the provisions of Chapter 20 of the Laws of 1900 of the State of New York known as the Forest Fish and Game Law, so far as they relate to the said August Silz and his possession in the County of Kings of one imported grouse known in England as black game or blackcock, and one imported golden plover known in England as golden plover, said imported grouse or blackcock having been law-

fully taken and killed in Russia during the open season for such game, and said imported golden plover having been lawfully taken and killed in England during the open season for such game, and said imported grouse or blackcock and said imported golden
63 plover having been lawfully purchased by said Silz in England and having been duly imported by said Silz into the State of New York in accordance with the laws of the United States during the open season in the State of New York for grouse and plover, and said imported grouse or blackcock and said imported golden plover being entirely different from any birds native to the State of New York or to America, and being different in form, size, color and markings, and also easily and readily distinguishable both with their feathers on and after they are plucked and ready for consumption, from the game birds known as plover and grouse in the State of New York, or from any birds native to the State of New York or to America, and said imported grouse or blackcock and said imported golden plover being at the time of said importation and at all times during their possesison by said Silz sound and wholesome articles of commerce, as set forth in the moving papers; in as much as the State of New York had no power or authority to prohibit the possession of said imported grouse or blackcock or said imported golden plover or to make the possession thereof a criminal offense or to punish the same by either fine or imprisonment, and in as much as the provisions of the Act of Congress entitled "An Act to enlarge the powers of the department of agriculture, prohibit the transportation by interstate commerce of game killed in violation of local laws, and for other purposes," approved May 25, 1900, did not and could not under the Constitution of the United States confer any such power or authority upon the State of New York, and the said provisions of said Chapter 20 of the Laws of 1900, in so far as they relate to the said Silz and his possession of said imported
64 grouse or blackcock and said imported golden plover, are unconstitutional, null and void, being in violation of the provisions of amendment XIV of the Constitution of the United States in that they operate to deprive persons of their liberty and property without due process of law.

VI. The said Court erred in deciding in favor of the validity of the provisions of Chapter 20 of the Laws of 1900 of the State of New York, known as the Forest, Fish and Game Law, so far as they relate to the said August Silz and his possession in the County of Kings of one imported grouse known in England as black game or blackcock, and one imported golden plover known in England as golden plover, said imported grouse or blackcock having been lawfully taken and killed in Russia during the open season for such game, and said imported golden plover having been lawfully taken and killed in England during the open season for such game, and said imported grouse or blackcock and said imported golden plover having been lawfully purchased by said Silz in England and having been duly imported by said Silz into the State of New York in accordance with the laws of the United States during the open season in the State of New York for grouse and plover, and said imported grouse or blackcock and said imported golden plover being entirely

different from any birds native to the State of New York or to America, and being different in form, size, color and markings, and also easily and readily distinguishable both with their feathers on and after they are plucked and ready for consumption, from the game birds known as plover and grouse in the State of New York or from any birds native to the State of New York or to America, and said imported grouse or blackcock and said imported golden plover being at the time of said importation and at all times
65 during their possession by said Silz, sound and wholesome articles of commerce, as set forth in the moving papers; in as much as the State of New York had no power or authority to prohibit the possession of said imported grouse or blackcock or said imported golden plover or to make the possesison thereof a criminal offense or to punish the same by either fine or imprisonment, and in as much as the provisions of the Act of Congress entitled "An Act to enlarge the powers of the department of agriculture, prohibit the transportation by interstate commerce of game killed in violation of local laws, and for other purposes," approved May 25th, 1900, did not and could not under the Constitution of the United States confer any such power or authority upon the State of New York, and the said provisions of said Chapter 20 of the laws of 1900, in so far as they relate to the said Silz and his possession of said imported game or blackcock and said golden plover, are unconstitutional, null and void, being in violation of the provisions of Section 8 of Article I of the Constitution of the United States, in that they constitute an unjustifiable interference with and regulation of interstate and foreign commerce.

Wherefore, said August Silz, the above named relator prays this Honorable Court to examine and correct the errors assigned; and for a reversal of the final order of said Supreme Court of the State of New York, made and entered as aforesaid on July 27, 1906.

Dated, New York, October 29th, 1907.

EDWARD R. FINCH,
JOHN B. COLEMAN,
Attorneys and Counsel for Relator.

Office & Post Office Address, 32 Nassau Street, Borough of Manhattan, City of New York.

66 [Endorsed:] 60/381. Supreme Court of the United States. The People of the State of New York *ex rel.* August Silz, Plaintiff-in-error, against Henry Hesterberg, Sheriff of the County of Kings, Defendant-in-error. Assignment of Errors. Edward R. Finch and John B. Coleman, attorneys for Plaintiff-in-error, 32 Nassau street, New York city. Filed Nov. 4, 1907.

SIR: Please take notice that the within is a copy of a — this day duly entered in the office of the clerk of ——.

Dated —— — 190–.

Yours, etc.,

FINCH & COLEMAN,
Attorneys for ——.

Office and post office address 32 Nassau street, borough of Manhattan, New York city.

To —— —— att'y for ——.

67 Know all Men by these Presents, That we, August Silz, of New York City, New York, as principal, and the American Bonding Company of Baltimore, having an office and place of business at No. 34 Nassau Street, New York City, N. Y., as sureties, are held and firmly bound unto Henry Hesterberg, Sheriff of the County of Kings, in the full and just sum of two hundred & fifty ($250.00) dollars, to be paid to the said Henry Hesterberg, Sheriff of the County of Kings, his certain attorney, executors, administrators, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 29th day of October, in the year of our Lord one thousand nine hundred and seven.

Whereas, lately at a Special Term of the Supreme Court, held in and for the County of Kings at the County Court House in said County, in a suit depending in said Court, between the People of the State of New York *ex rel.* August Silz, against Henry Hesterberg, Sheriff of the County of Kings, an order was rendered against the said August Silz, directing that the order of the Court of Appeals be made the order of the said Supreme Court, and the said August Silz having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the order in the aforesaid suit, and a citation directed to the said Henry Hesterberg, Sheriff of the County of Kings, citing and admonishing him to be and appear at a Supreme Court of the United States, at Washington within 30 days from the date thereof.

Now, the condition of the above obligation is such, That if the said August Silz shall prosecute said writ of error to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

AUG. SILZ. [SEAL.]
AMERICAN BONDING COMPANY
OF BALTIMORE. [SEAL.]
By HULBERT T. E. BEARDSLEY,
Resident Vice President. [SEAL.]

Attest:
[SEAL.] PAUL W. ARNOLD,
Resident Ass't Secretary.

Sealed and delivered in presence of—

____ ____.
____ ____.

Approved by—

____ ____,
Associate Justice of the Supreme Court of the United States.

68 Copy.

CITY AND COUNTY OF NEW YORK, *State of New York, ss:*

On Oct. 29, 1907, before me personally came Hulbert T. E. Beardsley, to me known, who, being by me duly sworn, did depose and say that he resides in the City of New York, that he is the Resident Vice-President of the American Bonding Company of Baltimore, the corporation described in and which executed the within instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so fixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order; and that the liabilities of said Company do not exceed its assets as ascertained in the manner provided by law. And the said Hulbert T. E. Beardsley, further said that he was acquainted with Paul W. Arnold and knew him to be the Resident Secretary of said Company; that the signature of said Resident Assistant Secretary subscribed to the within instrument is the genuine handwriting of the said Resident Assistant Secretary and was subscribed thereto by like order of the Board of Directors, in the presence of him, the said Hulbert T. E. Beardsley.

[SEAL.] EDWARD F. HEALEY,
Notary Public, New York County.

American Bonding Company of Baltimore.

Extract from Minutes of a Meeting of the Board of Directors of American Bonding Company of Baltimore, Held at the Office of the Company, at Baltimore, Maryland, on the 9th Day of July, A. D. 1907.

At a regular meeting of the Board of Directors of the American Bonding Company of Baltimore, held in the Office of the Company, at Baltimore, Maryland, on the 9th day of July, A. D., 1907, the following resolution was adopted:

"Resolved, that Hulbert T. E. Beardsley and Edward B. Southworth, Jr., of the City of New York, New York, be and hereby are appointed Resident Vice-Presidents of this Company at New York, New York, and are, and each of them is, hereby authorized and empowered to execute and deliver and attach the seal of the Company to any and all bonds and undertakings, for or on behalf of the Company in its business of guaranteeing the fidelity of persons holding places of public or private trust and guaranteeing the performance of contracts other than insurance policies, and executing or guaranteeing bonds and undertakings required or permitted in all actions or proceedings by law allowed or required; such guarantee, bonds and undertakings, however, to be attested in every instance by one of the following named persons: Paul W. Arnold, Charles H. Worcester, Edward F. Healey or John D. Wareing, who are hereby appointed Resident Assistant Secretaries of this Company at New York City, New York."

I, Paul W. Arnold, Resident Assistant Secretary of the American Bonding Company of Baltimore, do hereby certify that the foregoing is a true and correct copy of a resolution of the Board of Directors of the American Bonding Company of Baltimore, and is the whole of said resolution.

In Witness Whereof, I have hereunto subscribed my name and affixed the seal of the American Bonding Company of Baltimore, at the City of New York, N. Y., Oct. 29, 1907.

[SEAL.] PAUL W. ARNOLD,
Resident Assistant Secretary.

Statement of the Financial Condition of the American Bonding Company of Baltimore at the Close of Business June 30th, 1907.

Assets.		Liabilities.	
United States Government Bonds	$104,750.00	Capital Stock	$500,000.00
State and Municipal Bonds.	607,572.00	Due for Re-insurance	10,593.82
Railroad and Street Railway Bonds	451,812.50	Legal Reserve	428,852.20
Other Stocks and Bonds	118,750.00	Reserve for Losses and Contingencies	222,856.32
Outstanding Premiums (less commissions)	148,218.17	Surplus and Undivided Profits	428,186.52
Accounts Receivable (Secured)	26,250.00		
Interest Accrued	8,422.02		
Real Estate	8,300.84		
Mortgage Loans	6,500.00		
Cash in Office and Depositories	109,913.33		
	$1,590,488.86		$1,590,488.86

CITY AND COUNTY OF NEW YORK, *State of New York, ss:*

I, Hulbert T. E. Beardsley, Resident Vive-President of the American Bonding Company of Baltimore, do hereby certify that the foregoing is a true statement of the Assets and Liabilities of said Company at the close of business, June 30th, 1907.

In testimony whereof, I hereunto set my hand and affix the seal of the Company Oct. 29, 1907.

[SEAL.] HULBERT T. E. BEARDSLEY,
Resident Vice-President.

Subscribed and sworn to before me Oct. 29, 1907.

[SEAL.] EDWARD F. HEALEY,
Notary Public, New York County.

69 STATE, CITY, AND COUNTY OF NEW YORK, *ss:*

On this 29th day of October 1907, before me personally came August Silz, to me known and known to me to be the person described in and who executed the foregoing bond, as principal thereof,

and he thereupon duly acknowledged to me that he executed the same.

A. GODCHAUD,
Notary Public, N. Y. County.

[NOTARIAL SEAL.]

70 [Endorsed:] E. 60/381. United States Supreme Court. The People of the State of New York *ex rel.* August Silz, Plaintiff in Error, against Henry Hesterberg, Sheriff of the County of Kings. Bond. Edward R. Finch & John B. Coleman, attorneys and counsel for relator, 32 Nassau Street, New York City. The within undertaking is approved as to form and as to the sufficiency of the surety. R. W. Peckham, Ass. Jus. Sup. Ct. U. S. American Bonding Company of Baltimore, 34 Nassau St., Mutual Life Bldg., New York City. Surety. Filed Nov. 4, 1907. 1905. No. 4343.

SIR: Take notice that the within is a copy of a — this day duly entered in this action and filed in the office of the Clerk of ——.

Dated, New York, —— — 190–.

Yours, etc.,

—— ——
Attorney for ——.

To —— —— Attorney for ——.

71 STATE OF NEW YORK,
Court of Appeals, State Reporter's Office, ss:

I, Edward A. Bedell, Reporter of the Court of Appeals of the State of New York, do hereby certify that I have compared the annexed copy of opinion in the cases of People *ex rel.* Hill and Silz *v.* Hesterberg, Sheriff, &c., decided by the Court of Appeals on the 27th day of February, 1906, with the official opinion rendered in such case, and I further certify that the same is a true and correct copy of said opinion and of each and every part thereof.

In witness whereof, I have hereunto affixed my signature as Reporter of the Court of Appeals, at the City of Albany, in the State of New York, this 6th day of November, 1907.

[Seal State of New York, Court of Appeals.]

EDWIN A. BEDELL,
As Reporter of the Court of Appeals of the State of New York.

Attest:
[L. S.] W. H. SHANKLAND,
Clerk of the Court of Appeals.

STATE OF NEW YORK, *Court of Appeals:*

I, Edgar M. Cullen, Chief Judge of the Court of Appeals of the State of New York, the highest Appellate Court and Court of Record in and for said State, do hereby certify that W. H. Shankland is the clerk of said court, having custody of the seal of said court and of the decisions, minutes and records thereof, and that Edwin A. Bedell is the official reporter of said court, having custody of the

official opinions, written and handed down by said court and the members thereof, and of the official publication and reports thereof; and, I further certify that the attestation and authentication, by said clerk and said reporter of the annexed copy of the official opinion rendered in the cases of People *ex rel.* Hill and Silz *v.* Hesterberg, Sheriff, &c., decided by the said Court of Appeals on the 27th day of February, 1906, is in due form and sufficient under the laws of the State of New York and the rules and practice of the said Court of Appeals; that the seal imprinted thereon is the true and genuine seal of the said Court of Appeals, and that the signature of W. H. Shankland, as clerk of said court, appended thereto is the true and genuine signature of said W. H. Shankland, and the signature of Edwin A. Bedell, as reporter of said court, appended thereto is the true and genuine signature of said Edwin A. Bedell.

In witness whereof, I have hereunto subscribed my official signature, at the Chambers of said court, at the Capitol of said State, in the City of Albany and State of New York, on the eleventh day of November, in the year of — one thousand, nine hundred and seven.

EDGAR M. CULLEN,
As Chief Judge of the Court of Appeals of the State of New York.

72 Court of Appeals.

PEOPLE *ex Rel.* JOHN HILL, Respondent,
against
HENRY HESTERBERG, as Sheriff of the County of Kings, Appellant.

PEOPLE *ex Rel.* AUGUST SILZ, Respondent,
against
HENRY HESTERBERG, as Sheriff of the County of Kings, Appellant.

(Reported in 184 N. Y., p. 126.)

(Decided February 27, 1906.)

Appeal in each of the above entitled proceedings from an order of the Appellate Division of the Supreme Court in the second judcial department, entered November 29, 1905, which reversed an order of Special Term, quashing a writ of *habeas corpus* and directing that the relators be discharged from the custody of the defendant.

Julius M. Mayer, Attorney General (Alexander T. Mason, of counsel) for appellant.

John F. Clarke, District Attorney (Robert H. Elder, of counsel), for appellant.

Edward Lauterbach, Edward R. Finch & John B. Coleman, for August Silz, respondent, John L. Hill, for John Hill, respondent.

CULLEN, *Ch. J.*:

The relators were arrested on warrants charging them with a violation of the Game Law. They sought discharge from their arrest by writs of *habeas corpus*. On the return to those writs they were remanded to custody. On appeal to the Appellate Division the orders of the Special Term were reversed and the relators discharged from custody. From those orders these appeals are taken. As the affidavits on which the warrants for the arrest of the relators were issued differ materially in their statements of facts, we will
73 first consider the one made in the Hill case. The affidavit avers that on the 3rd day of March said John Hill did have in his possession in the Clarendon Hotel, in the Borough of Brooklyn, one dead body of a bird known as a golden plover and one dead body of a fowl commonly called a grouse; that as the affiant was informed and believed the said plover and grouse were taken without the state of New York, to wit, from England and Russia and thence brought into the Borough of Brooklyn.

The Forest Fish and Game Law (Chap. 20 Laws of 1900, amended Chaps. 194 and 317 Laws of 1902, Chap. 588 Laws of 1904) by sections 106 and 108 enacts that grouse shall not be taken or possessed from January 1st to October 31st, no plover from January 1st to July 15th. By section 140 of said act grouse is defined to include ruffed grouse, partridge, and every member of the grouse family. By section 141 the inhibition enacted by the other sections of the Statute is made to apply to fish, game or flesh coming from without the State as well as to that taken within the state. By section 119 anyone violating the provisions of the statute hereinbefore recited is guilty of a misdemeanor and liable to a fine of twenty-five dollars for each bird taken or possessed in violation thereof. The relator was in possession of the birds during the prohibited period, and, hence, was guilty of a misdemeanor, unless he is relieved from the penalties prescribed by the statute by the fact that the birds
74 were imported from foreign countries. We shall not discuss at any length the claim of the relator that the statute contravenes the Constitution of this State as depriving the relator of his property without due process of law. That question has been settled adversly to that claim by the decisions of this court in Phelps *vs.* Racey (60 N. Y. 10) and People *vs.* Bootman (180 N. Y. 1) in which it was held within the power of the legislature, in order to effect the preservation of game within the State, to enact not only a close- season during which the possession of such game should be unlawful but also to enact that the possession in the State, during such season, of game taken without the State should be equally unlawful. The Phelps case is cited by the Supreme Court of the United States in Geer *vs.* Connecticut (161 U. S. 519) in which the validity of a statute of that state was upheld, not only on the ground that the original ownership of wild game is in the state, but on the further ground that the preservation of such game is a valid exercise of the Police Power of the State. To the argument that the exclusion of foreign game in no way tends to the preservation of domestic

game it is sufficient to say that substantially the uniform belief of legislatures and people is to the contrary, and that both in England and many of the states in this country legislation prohibiting the possession of foreign game during the close- season has been upheld as being necessary to the protection of domestic game, on the
75 ground that without such inhibition or restriction any law for the protection of domestic game could be successfully evaded (Whitehead *vs.* Smithers, L. R. [2 Common Pleas Div.] 553; *Ex parte* Mayer, 103 Cal., 476; Magner *vs.* People, 97 Ill. 320; Missouri *vs.* Randolph, 1 Mo. Appeals 151; Stevens *vs.* State, 89 Md. 669; Roth *vs.* State 51 Ohio State 209; Commonwealth *vs.* Savage, 155 Mass. 278). The case of Phelps *v.* Racey (*supra*) has never been overruled by this court. In the opinion delivered in People *vs.* Buffalo Fish Co., (164 N. Y. 93) Judge O'Brien took two positions; first, that the exclusion of fish taken without the State was invalid as interferring with the power of Congress to regulate foreign and interstate commerce, and second, that under a proper construction of the game law as it then stood the statute was applicable only to fish taken within the State. It was this second ground alone which commanded the assent of the majority of judges and on which the decision in the case proceeded. This ground has been removed by the amendment of the statute already cited which makes it applicable to game taken without the state. People against Bootman (*supra*) reaffirmed the doctrine of Phelps *vs.* Racey and the validity of the legislation before us, at least so far as the Constitution of this State is involved. In that case while we affirmed the decison below because the offences for which the defendant was prosecuted were committed before the amendment to the statute, we felt called
76 upon to express our opinion on the whole subject, so that the citizen might not be misled by the opinion rendered in the court below and thus unwittingly subject himself to severe penalties. If as is claimed the views then expressed by the Court on the subject now before us were obiter and not necessary to the decision made, it is sufficient to say we adhere to them, not on the ground of *stare decisis* but because they command our approval. Therefore, if the act of Congress, passed May 25th, 1900, commonly termed the "Lacey Act" empowered the State to enact the legislation before us it is unnecessary for us to enter into any examination of the question of interference with foreign and inter-state commerce, discussed but not decided in People *vs.* Buffalo Fish Company.

That Congress can authorize an exercise of the Police Power by a State, which without such authority would be an unconstitutional interference with commerce has been expressly decided by the Supreme Court of the United States in matter of Rahrer (140 U. S. 545). The question before us is merely interpretation of the Lacey Act which the learned counsel for the respondents contend applies solely to interstate shipments and not to importations from foreign countries. The act is entitled: "An act to enlarge the powers of the Department of Agriculture — prohibit the transportation by interstate commerce of game killed in violation of local laws, and for other purposes." The first section relates to the Department of Agriculture,

the second prohibits the importation of any foreign wild
77 animal or bird except under special permit from that De-
partment, providing that it shall not restrict the importation of natural history specimens nor caged birds, such as domesticated canaries, parrots and the like. It then forbids absolutely the importation of the mongoose, flying foxes, the English sparrow and such other birds as the Secretary of Agriculture may deem injurious to the interest of agriculture or horticulture. The third section forbids the delivery to a common carrier for shipment from one state to another of any wild animals or birds killed in the State in violation of its laws. The fifth section deals with the transportation into any state of animals killed without the state. It is as follows: "That all dead bodies, or parts thereof, of any foreign game animals, or game or song-birds, the importation of which is prohibited, or the dead bodies, or parts thereof, of any wild game animals, or game or song birds transported into any State or Territory, or remaining therein for use, consumption, sale, or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such animals or birds had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise. This Act
shall not prevent the importation, transportation, or sale of
78 birds or bird plumage manufactured from the feathers of
barnyard fowl." It is contended that the title of the statute tends to show that the operation of section 5 is confined to shipment from other states and not to importation from foreign countries. If the title of an act could limit its effect, which it cannot (Potter's Dwarris on Statutes page 102) still this claim is without foundation. The first two sections of the act deal with the Department of Agriculture, and the reference thereto in the title is appropriate. The Third and fourth sections deal with interstate transportation of game killed in violation of local laws and the reference in the title "Prohibit the transportation by interstate commerce of game killed in violation of local laws" is equally appropriate. The fifth section, which is the one before us, deals with an entirely different matter, transportation into a state, not out of a state, and is embraced in the title of the statute only under the designation "and for other purposes." As to this subject, therefore, the title in no respect tends to limit the effect of the act. It is difficult to see any reason why Congress should have sought to discriminate between the bodies of game, song birds or wild animals brought into a state from other states and those brought from foreign countries. The object of the legislation was to enable the States by their local law to exercise a power over the subject of the preservation of game and song birds, which
without that legislation they could not exert. Every Consid-
79 eration that led Congress to think it wise to confer on the
State of New York, as well as on other states, power (which is practically that of prohibition during the close- season, at least for the purposes of sale) over the importation of partridges from New

Jersey, Pennsylvania or Connecticut is equally applicable to the importation of such birds from Canada. The obstacle to the successful enforcement of the Game Laws of the State would be as great in the one case as the other, and as Canada borders on the United States for a distance of three thousand miles the practical danger would be as great in one case as in the other, whatever it might be in the case of an importation from Europe. But it is said Congress permits the importation of foreign game and collects the duty thereon, and it cannot have intended to allow property thus imported to be confiscated. The proposition that Congress allows the importation of foreign game is true only in a restricted sense. By the "Lacey Act" Congress determined to aid the States in the enforcement of their game laws but did not deem it wise to enact a Game Law of its own, and this for the very obvious reason that the Game Laws of the different States vary greatly, a variation justified in no small degree by varying climatic conditions. It would be unwise to entirely prohibit the importation of game into the country during a part of the year, during which in some of the states the taking and consumption of such game is lawful. So Congress practically said to the
80 citizen: we do not prohibit the importation of foreign game but subject it to the local laws, and you must see to it, at your risk, that you do not violate those laws. The term "Transported" is used in the Wilson Act of Congress, relative to intoxicating liquors (Enacted August 8, 1890) as in the present act. Yet, it seems incredible that Congress intended to suffer the State of Maine to seize liquor in original packages when brought from Massachusetts, but not when brought from Canada or Europe. The words of the section before us are sufficiently comprehensive to include all game brought into the State from whatever place and we do not think it profitable to enter into a verbal analysis, save in one respect. It is urged that the concluding sentence of the section, "That act shall not prevent the importation, transportation or sale of birds or bird plumage manufactured from the feathers of barnyard fowl" excludes all birds from its operation. We think not. The qualification "manufactured from feathers of the barnyard fowl" applies as well to birds as to bird plumage. Birds mentioned in this sentence are plainly artificial birds and so the Treasury Department of the United States has ruled.

The case of Silz is somewhat different. The affidavit on which the warrant in this case was issued creates a strong suspicion that
81 the prosecution was instituted by collusion. It states not only that the defendant had in his possession the prohibited game but also almost every fact by which the defendant's counsel hope to relieve his client from the penalties of the law, facts which it is difficult, if not impossible to see how they could have been within the affiant's knowledge. For that reason we should be inclined to refuse to entertain the cause had not the Attorney-General intervened and prosecuted the appeal. Substantially all the questions raised by the affidavit, save one, are disposed of by the views we have already expressed. The exception is the statement in the affidavit "that said imported golden plover and imported grouse are different varieties of game birds from the game birds known as plover and grouse in

the State of New York and from any birds native to America. They are different in form, shape, size color and marking from the game birds known as plover and grouse in the State of New York." Of course, if the birds, the possession of which is charged against the relator, are not grouse or birds of the grouse family, then no crime is stated in the affidavit and the relator should be discharged. But in view of the express allegation at the commencement of the affidavit that the defendant was possessed of one imported grouse we are inclined to the view that the statement quoted should be construed as meaning not that the bird so possessed was not a grouse but
82 that it was a different variety of grouse from that which is native to the State of New York. So construed this fact constitutes no defense, nor does the allegation that they are different in form, shape and color from native birds. It was for the legislature to determine, in the protection of native game, how far it was necessary or wise to include within the penal provisions of the statute birds of the same family and of a similar character, though differing in some respects. Of course, this statement is made within limits. To protect pigeons turkeys could not be excluded. In the present case, however, we are clear that the legislature has acted within its power.

The order of the Appellate Division in each case should be reversed, that of the Special Term affirmed, and the relators remanded to custody.

Gray O'Brien, Edward T. Bartlett, Werner, Hiscock and Chase, JJ., concur.

Orders reversed etc.

83 [Endorsed:] C. W. O. Chf. G. E. B. Hi. No. 46. Hill pl. *v.* Hesterberg, app. N. Y.

84 [Endorsed:] E. 60/469. Court of Appeals. People *ex rel.* August Silz, Respondent, against Henry Hesterberg, Sheriff of the County of Kings, Appellant. Opinion. Filed Nov. 13, 1907. 1905 No. 4343.

Endorsed on cover: File No. 20,905. New York supreme court. Term No. 502. The People of the State of New York *ex rel.* August Silz, plaintiff in error, *vs.* Henry Hesterberg, sheriff of the county of Kings. Filed November 22d, 1907. File No. 20,905.

Supreme Court of the United States,

OCTOBER TERM, 1907.

No. 206

THE PEOPLE OF THE STATE OF NEW YORK ex rel. AUGUST SILZ,

Plaintiff in Error,

vs.

HENRY HESTERBERG, Sheriff of the County of Kings,

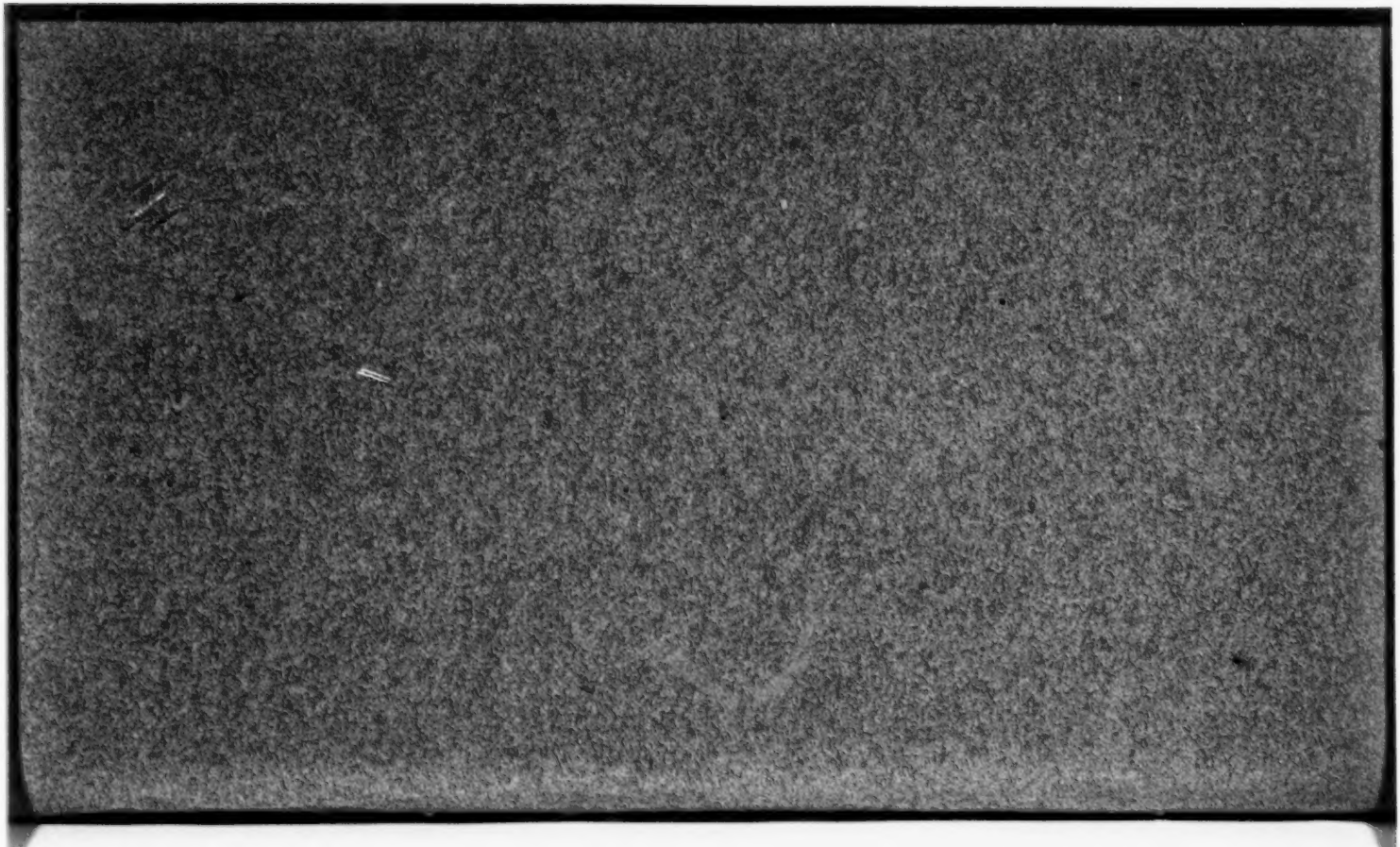
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

NOTICE, MOTION AND GROUNDS OF PLAINTIFF IN ERROR TO ADVANCE CAUSE.

EDWARD A. PINCH,
JOHN J. COLEMAN,

Attorneys and Counsel for Plaintiff in Error.



Supreme Court of the United States.

THE PEOPLE OF THE STATE OF NEW YORK *ex rel.* AUGUST SILZ, Plaintiff in Error, vs. HENRY HESTERBERG, Sheriff of the County of Kings, Defendant in Error.	No. 502. October Term, 1907.

Notice of Motion to Advance.

Please take notice that upon the record and all the proceedings herein, we shall, upon the 27th day of January, 1908, at the opening of the Court upon that day or as soon thereafter as counsel can be heard, move the Supreme Court of the United States, at the Capitol, in the City of Washington, to advance this cause upon the docket of the Court for the October term, 1907, and to set the same for argument at as early a date as may be convenient to the said Court.

Dated the 10th day of January, 1908.

EDWARD R. FINCH,
JOHN B. COLEMAN,
Attorneys and Counsel for Plaintiff in Error.

To ROBERT H. ELDER,
Assistant District Attorney for the County of Kings and Attorney for Defendant in Error.
WILLIAM S. JACKSON,
Attorney General of the State of New York.

SUPREME COURT OF THE UNITED STATES.

THE PEOPLE OF THE STATE OF NEW YORK *ex rel.* AUGUST SILZ, Plaintiff in Error. vs. HENRY HESTERBERG, Sheriff of the County of Kings, Defendant in Error.	No. 502. October Term, 1907.

Motion to Advance.

The plaintiff in error hereby moves this Honorable Court, upon the record and all the proceedings herein, to advance this cause upon the docket of the Court for the October Term, 1907, and to set the same for argument at as early a date as may be convenient to the Court.

WASHINGTON, D. C., the 27th day of January, 1908.

EDWARD R. FINCH,
JOHN B. COLEMAN,
Attorneys and Counsel for Plaintiff in Error.

In view of the public interests involved and of the desire of the State for an early decision. we hereby respectfully join in the above motion.

Dated New York, the 14th day of January, 1908.

ROBERT H. ELDER,
Assistant District Attorney of Kings County and Attorney for Defendant in Error.
WILLIAM S. JACKSON,
Attorney-General of the State of New York.

SUPREME COURT OF THE UNITED STATES.

THE PEOPLE OF THE STATE OF NEW YORK *ex rel.* AUGUST SILZ, Plaintiff in Error, AGAINST HENRY HESTERBERG, Sheriff of the County of Kings, Defendant in Error	No. 502. October Term, 1907.

BRIEF OF PLAINTIFF IN ERROR ON MOTION TO ADVANCE.

Statement.

This cause raises the question of the validity, under the Constitution of the United States, of Chapter 20 of the Laws of 1900 of the State of New York, entitled, "An Act for the protection of the forests, fish and game of the State, constituting Chapter thirty-one of the general laws."

Section 106 of this law provides as follows:

> "*Grouse* and quail shall not be taken from January first to October thirty first, both inclusive. Woodcock shall not be taken from January first to July thirty-first, both inclusive. Such birds shall not be *possessed* in their close season except in the City of New York, where they may be possessed during the open season in the State at large."

Section 25 of the law provides as follows:

> "The close season for grouse shall be from December first to September fifteenth both inclusive. No person shall take more than

thirty-six grouse in an open season. (*As amended by Section 2, Chapter 317, Laws of 1902.*)

Section 108 of the law provides as follows:

"*Plover*, curlew, jacksnipe, Wilsons, commonly known as English snipe, Yellow legs, killdeer, willett snipe, dowitcher, short necks, rail, sandpiper, baysnipe, surf snipe, winter snipe, ringnecks, and oxeyes shall not be taken or possessed from January first to July fifteenth both inclusive." (*As amended by Section 2, Chapter 588, Laws 1904.*)

Section 141 of the law provides:

"Whenever in this act the possession of fish or game, or the flesh of any animal, bird or fish is prohibited, reference is had equally to such fish, game or flesh coming from without the State as to that taken within the State * * * "

(*Added by Chapter 194 of the Laws of 1902.*)

Section 39 of the law provides as follows:

"A person who violates any provision of this article is guilty of a misdemeanor and is liable to a penalty of sixty dollars and to an additional penalty of twenty-five dollars for each bird or quadrupeds or part of bird or quadrupeds taken, possessed, transported or had in possession for transportation in violation thereof." (*As amended by Section 9, Chapter 580 of the Laws of 1904.*)

On the 30th day of March, 1905, the relator, August Silz, had in his possession in the County of Kings, City of New York, one imported golden plover which was lawfully taken, killed and captured in England during the open season for such game there, and thereafter sold and consigned to Silz in New York City by a dealer in game in the City of London, England, and one imported blackcock which was lawfully taken, killed and captured in

Russia during the open season for such game there, and thereafter sold and consigned to Silz in New York City by the same dealer in London. Such birds were duly imported by Silz in accordance with the provisions of the Tariff Laws and Regulations in force, through the Custom House in New York City, during the open season for plover and grouse in the State of New York. Such Imported Golden Plover and Imported Blackcock are entirely different varieties of game birds from game birds known as plover and grouse in the State of New York, and from any bird native to New York or to America; they are different in form, size, color and markings from the game birds known as plover and grouse in the State of New York, and from any American bird, and can be easily and readily distinguished from plover and grouse found in New York State and from any bird native to America, both with their feathers on and after they are plucked, and even when they are cooked and ready for the table. These birds were and are staple, sound, wholesome and valuable articles of food, and are in constant use as such, and are recognized and staple articles of commerce between the different countries of Europe and the United States of America and were of the fair market value of $1.50 (Record, p. 6).

A complaint having been made on April 7, 1905, by one, Fitzgibbons, a warrant was issued charging the relator with having committed a misdemeanor, and the defendant in error, the Sheriff of the County of Kings, by virtue of the said warrant arrested the relator and took him into custody (Record, p. 7).

Upon the relator's petition, a writ of *habeas corpus* was issued out of the Supreme Court of the State of New York; the defendant in error produced the relator before a Justice of that Court, as directed by the writ, and made a return (Record, p. 5), to which the relator duly filed a demurrer (Record, p. 8). The matter was thereupon heard by the Justice, who made a final order dismissing and

quashing the writ and remanding the relator to the custody to the Sheriff (Record, p. 9).

This order was reversed by the Appellate Divison of the Supreme Court of the State of New York in and for the Second Department and the relator discharged from custody (Record, pp. 11, 12). Upon an appeal being taken to the Court of Appeals of the State of New York, the order of the Appellate Division was reversed and the relator was again remanded to the custody of the Sheriff (Record, p. 24).

The records and proceedings in the cause were subsequently remitted to the Supreme Court of the State of New Yark in and for the County of Kings, and the final order and judgment of the Court of Appeals was made and entered as the final order and judgment of the said Supreme Court (Record, pp. 25, 26).

Upon the petition of the relator, a writ of error has been duly issued out of this Honorable Court to review the said final order and judgment (Record, pp. 29, 30).

The petition for the writ of *habeas corpus* and the demurrer to the return of the Sheriff duly raised the question of the constitutionality of the Game Law under the Constitution of the United States (Record, pp. 1-8), and this matter was argued before and passed upon by each one of the State courts in turn. The majority and dissenting opinions in the Appellate Division of the Supreme Court (Record, pp. 13-23), are reported in *109 App. Div., 295*, and the opinion of the Court of Appeals (Record, pp. 41-45), is reported in 184 N. Y., 126.

Reasons for this application.

This is a criminal case and the questions involved are of great and widespread importance, involving and affecting matters of general public interest. This is primarily a proceeding to test the validity of legislation of a more or less novel character. The business of importing foreign game into New York

is a large and important one. That portion of the community engaged in this business must practically cease doing business until a final decision upon this case is reached, or else incur liability for millions of dollars in penalties.

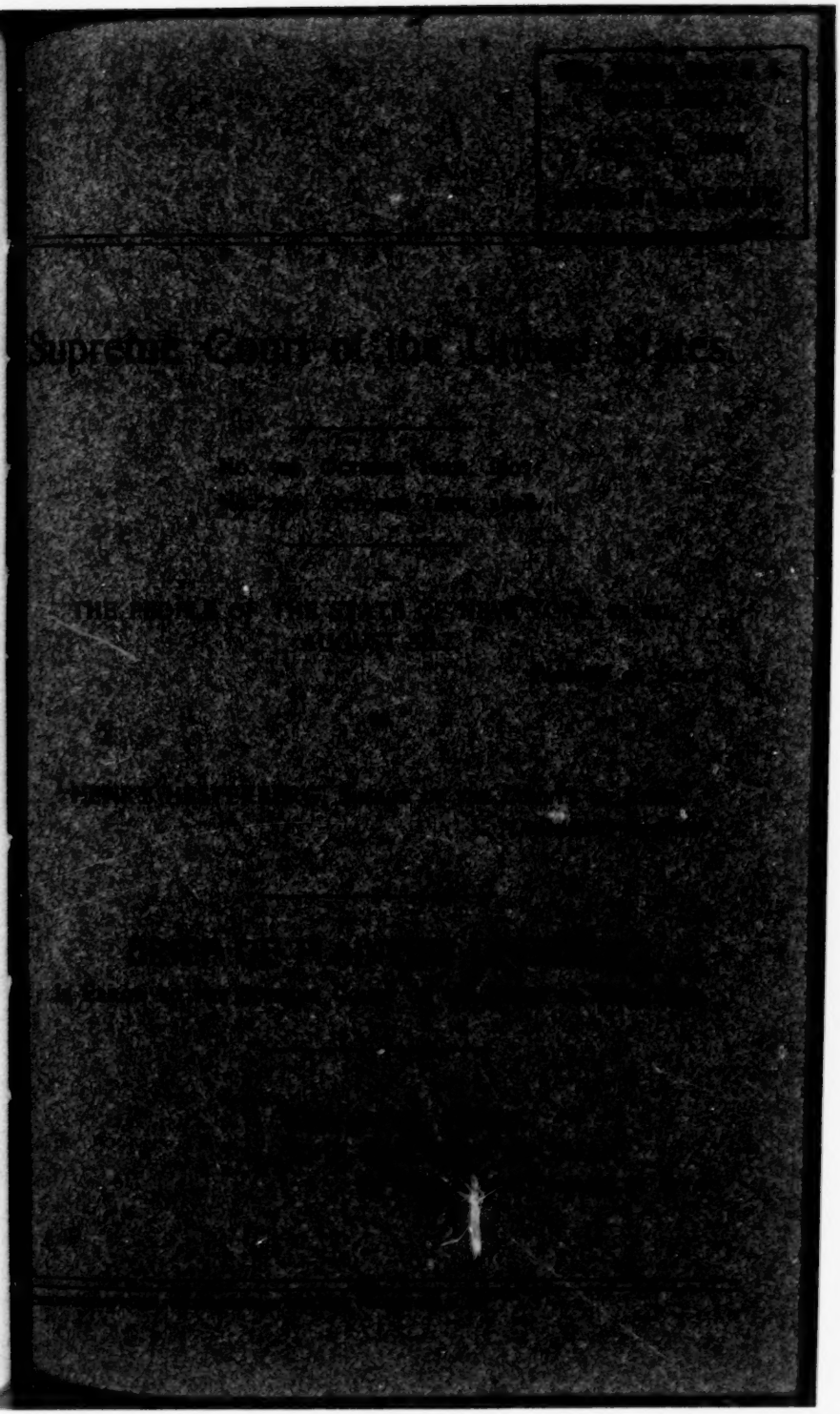
Moreover, we understand that it is the intention of the Forest, Fish and Game Commission to have the Legislature of the State of New York, at its present session which commenced January 1, 1908, revise and codify all the game laws of the State. A final decision on the questions in this cause would be of great aid to them in this revision.

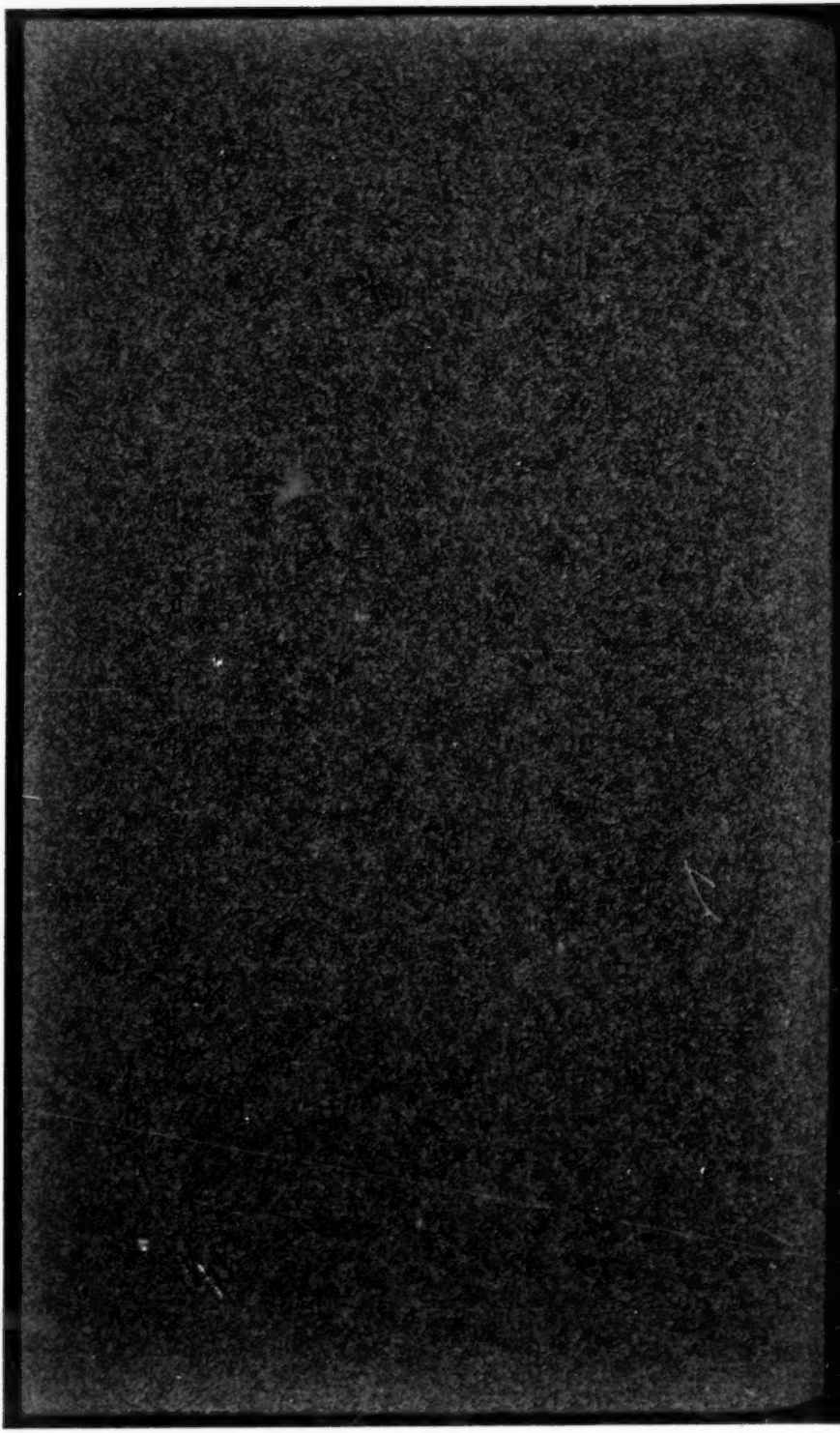
Notwithstanding the decision of the Court of Appeals in this case declaring the game law constitutional, there are grave doubts in the minds of many jurists and members of the bar as to whether the Court of Appeals has decided this matter properly. In support of this, we point to the decision of the Appellate Division of the Supreme Court which sustained the contention advanced by us and declared the game law unconstitutional.

We believe that there is a widespread interest in this cause and a general public need for an early and authoritative decision by this Court.

We are aware that this Honorable Court is averse to advancing a cause on its docket thereby retarding the hearing of other causes having a prior position. We believe, however, that this cause involves questions of great importance and of such general public interest, that it is proper to request this Court, in its discretion, to advance the cause and set it for an early hearing; and we respectfully move that such action be taken.

EDWARD R. FINCH,
JOHN B. COLEMAN,
Attorneys and Counsel for Plaintiff in Error.





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Supreme Court of the United States

THE PEOPLE OF THE STATE OF NEW YORK *ex rel.* AUGUST SILZ, Plaintiff-in-Error, vs. HENRY HESTERBERG, Sheriff of the County of Kings, Defendant-in-Error.	No. 206. October Term, 1908.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

BRIEF OF PLAINTIFF-IN-ERROR.

Statement.

This cause raises the question of the validity, under the Constitution of the United States, of Chapter 20 of the Laws of 1900 of the State of New York, entitled "An Act for the protection of the forests, fish and game of the State, constituting Chapter Thirty-one of the general laws."

Section 106 of this law provides as follows:

> "Grouse and quail shall not be taken from January first to October thirty-first, both inclusive. Woodcock shall not be taken from January first to July thirty-first, both inclusive. Such birds shall not be possessed in their close season except in the City of New York, where they may be possessed during the open season in the State at large."

Section 25 of the law provides as follows:

> "The close season for grouse shall be from December first to September fifteenth, both inclusive. No person shall take more than thirty-six grouse in an open season. (*As amended by Section 2, Chapter 317, Laws of 1902.*"

Section 140 of the law contains the following definition:

> "L.—Grouse includes ruffed grouse, partridge and every member of the grouse family."

Section 108 of the law provides as follows:

> "Plover, curlew, jacksnipe, Wilsons, commonly known as English snipe, yellow legs, killdeer, willett snipe, dowitcher, shortnecks, rail, sandpiper, baysnipe, surf snipe, winter snipe, ringnecks and oxeyes shall not be taken or possessed from January first to July fifteenth, both inclusive." *As amended by Section 2, Chapter 588, Laws 1904.*

Section 141 of the law provides as follows:

> "Whenever in this act the possession of fish, or game, or the flesh of any animal, bird or fish is prohibited, reference is had equally to such fish, game or flesh coming from without the State as to that taken within the State; Provided, nevertheless, that if there be any open season therefor, any dealer therein, if he has given the bond herein provided for, may hold during the close season such part of his stock as he has on hand undisposed of at the opening of such close season. Said bond shall be to the people of the State, conditioned that such dealer will not during the close season ensuing, sell, use, give away or otherwise dispose of any fish, game, or the flesh of any animal, bird or fish which he is permitted to possess during the close season by this section; that he will not in any way during the time said bond is in force violate

any provision of the forest, fish and game law; the bond may also contain such other provisions as to the inspection of the fish and game possessed as the commission shall require, and shall be subject to the approval of the commission as to amount and form thereof, and the sufficiency of sureties. But no presumption that the possession of fish or game or the flesh of any animal, bird or fish is lawfully possessed under the provisions of this section shall arise until it affirmatively appears that the provisions thereof have been complied with." (*Added by Chap. 194, Laws of 1902.*)

Section 119 of the law provides as follows:

"A person who violates any provision of this article is guilty of a misdemeanor and is liable to the following penalty for violation thereof: For each deer or part of deer taken or possessed in violation thereof one hundred dollars; for each bird taken or possessed in violation thereof, twenty-five dollars; for each squirrel, hare or rabbit taken or possessed in violation thereof, ten dollars; and for each fish taken or possessed in violation thereof, the sum of ten dollars; for every other violation thereof, sixty dollars."

Section 5 of the "Lacey Act" (31 U. S. Stat. at Large, C. 553), which is the operative portion of the act in reference to the effect of the State game laws, is as follows:

"SECTION 5. That all dead bodies or parts thereof, or any foreign game animals, or game or song birds, the importation of which is prohibited, or the dead bodies, or parts thereof, of any wild game animals, or game or song birds transported into any state or territory, or remaining therein for use, consumption, sale, or storage therein, shall upon arrival in such state or territory be subject to the operation and effect of the laws of such state or territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such animals and birds had been produced in such state or ter-

ritory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise. This act shall not prevent the importation, transportation, or sale of birds or bird plumage manufactured from the feathers of barnyard fowl."

It is admitted on the record by both sides that on the 20th day of March, 1905, during the close season, the relator, August Silz, had in his possession in the County of Kings, City of New York, one Imported Golden Plover which was lawfully taken, killed and captured in England during the open season for such game there, and thereafter sold and consigned to Silz in New York City by a dealer in game in the City of London, England, and one Imported Blackcock, which is a member of the grouse family, which was lawfully taken, killed and captured in Russia during the open season for such game there, and thereafter sold and consigned to Silz in New York City by the same dealer in London. Such birds were duly imported by Silz in accordance with the provisions of the Tariff Laws and Regulations in force through the Custom House in New York City, during the open season for plover and grouse in the State of New York. Such Imported Golden Plover and Imported Blackcock are entirely different varieties of game birds from game birds known as plover and grouse in the State of New York, and from any bird native to New York or to America; they are different in form, size, color and markings from the game birds known as plover and grouse in the State of New York, and from any American bird, and can be easily and readily distinguished from plover and grouse found in New York State and from any bird native to America, both with their feathers on and after they are plucked, and even when they are cooked and ready for the table. These birds were and are staple, sound, wholesome and valuable articles of food, and are in constant use as such, and are recognized and staple articles of commerce between the different countries of Eu-

rope and the United States of America and were of the fair market value of $1.50 (Record, p. 6).

A complaint having been made on April 7, 1905, by one Fitzgibbons, a warrant was issued charging the relator with having committed a misdemeanor by having in his possession the said golden plover and said blackcock, and the defendant-in-error, the Sheriff of the County of Kings, by virtue of the said warrant, arrested the relator and took him into custody (Record, p. 7).

Upon the relator's petition, a writ of *habeas corpus* was issued out of the Supreme Court of the State of New York; the defendant-in-error produced the relator before a Justice of that Court, as directed by the writ, and made a return (Record, p. 5), to which the relator duly filed a demurrer (Record, p. 8). The matter was thereupon heard by the Justice, who made a final order dismissing and quashing the writ and remanding the relator to the custody of the Sheriff (Record, p. 9).

Upon an appeal being taken, this order was reversed by the Appellate Division of the Supreme Court of the State of New York in and for the Second Department and the relator discharged from custody (Record, pp. 11, 12). Upon a further appeal being taken to the Court of Appeals of the State of New York, the order of the Appellate Division was reversed and the relator was again remanded to the custody of the Sheriff (Record, p. 24).

The records and proceedings in the cause were subsequently remitted to the Supreme Court of the State of New York in and for the County of Kings, and the final order and judgment of the Court of Appeals was made and entered as the final order and judgment of the said Supreme Court (Record, pp. 25, 26).

Upon the petition of the relator, a writ of error has been duly issued out of this Honorable Court to review the said final order and judgment (Record, pp. 28, 29, 30).

The petition for the writ of *habeas corpus* and the

demurrer to the return of the Sheriff duly raised the question of the constitutionality of the Forest, Fish and Game Law under the Constitution of the United States (Record, pp. 1-8) and this matter was argued before and passed upon by each one of the State Courts in turn. The majority and dissenting opinions in the Appellate Division of the Supreme Court (Record, pp. 13-23) are reported in *109 App. Div., 295;* and the opinion of the Court of Appeals (Record, pp. 41-45) is reported in *184 N. Y., 126.*

Specification of Errors.

The plaintiff-in-error contends:

FIRST.—That the provisions of the Forest, Fish and Game Law of the State of New York are in contravention of the Constitution of the United States in that they deprive the relator and all others similarly situated of their liberty and property without due process of law, contrary to the Fourteenth Amendment.

SECOND.—That the provisions of the Forest, Fish and Game Law of the State of New York are in contravention of the Constitution of the United States in that they constitute an unjustifiable interference with and regulation of interstate and foreign commerce in violation of Section 8 of Article I.

THIRD.—That the Court of Appeals of the State of New York erred in its construction and interpretation of the Act of Congress of May 25, 1900, entitled "An Act to Enlarge the Powers of the Department of Agriculture, prohibit the transportation by interstate commerce of game killed in violation of local laws, and for other purposes," commonly known as the Lacey Act (31 U. S. Stat. at Large, Chap. 553, p. 187).

POINT I.

The provisions of the Forest, Fish and Game Law are unconstitutional, in that they deprive the individual of his liberty and property without due process of law.

With this branch of the discussion the Act of Congress of May 25, 1900 (31 U. S. Stat. at Large, p. 187, Chap. 553), commonly known as the "Lacey Act," can have nothing to do, no matter what its effect may be upon the other branch of the discussion in reference to the violation of the provisions of the Federal Constitution concerning the regulation of interstate and foreign commerce. The "Lacey Act" did not, and could not affect the application of the Fourteenth Amendment to the Constitution of the United States, which prohibits the State from depriving a person of his liberty or property without due process of law. For the Congress of the United States, great as its powers undoubtedly are, has no more right than the State Legislature to pass any act that shall contravene the provisions of the Federal Constitution in this respect.

Much confusion and uncertainty are found in the Session laws and in the decisions in relation to game, which come in a great part from not considering the quality of the title which the possessor has in such property. There are two kinds or qualities of such title, depending upon the place of capture and possession. The game *in* the State is the property of the whole people, and the law-making power may permit or prohibit its capture, and if permitting, may impose such terms and conditions, not only as to the capturing, but also as to the disposition and use of the same, as it may choose. This arises from the State's right to dispose of the people's property. "From the earliest

traditions the right to reduce animals, *ferœ naturœ*, to possession has been subject to the control of the law-giving power" (*Geer* vs. *Connecticut*, *161 U.S.*, *519*). The wild game *within* a State belongs to the people in their collective, sovereign capacity; it is not the subject of private ownership, except in so far as the people may elect to make it so; and they may, if they see fit, absolutely prohibit the taking of it, or any traffic or commerce in it, if deemed necessary for its protection or preservation or the public good. In *Geer* vs. *Connecticut* (*supra*), it was held that a State law prohibiting the capturing of game for shipping out of the State was valid, and did not interfere with interstate commerce, as the people owned the game and could properly impose their own terms and conditions upon its capture; and the title to such game was subject to such conditions, and, therefore, it never became a subject for interstate commerce. Property taken from the owner upon condition is subject to that condition, and the taker and the possessors take it with such conditions attached.

The State may, therefore, impose its conditions upon which *its* game may be captured, and no one who takes the privilege can question the conditions. Such privileges being granted by legislation, and all persons presumably knowing the law, the conditions follow the game, and no person receiving it can complain because its possession is declared unlawful. Most of the game laws and decisions, while not always based on this conditional title, are consistent with and sustained by it.

But when game is obtained *outside* of the State and is brought into it as private property, the owner does not get his right to it from the State; he holds it independent of the State, the same as he owns his house, his cattle or his securities. He is the absolute, unqualified owner of the property, protected by the Constitution, and just as sacred from encroachment from the State as from others. The State may regulate its use, so that public health,

morals and safety shall not suffer therefrom, or the citizen be defrauded thereby, but it cannot prohibit its mere possession or make him a criminal because he is able to own it.

It is sometimes assumed that because the State can prohibit the possession of *State* game during the close season, it can prohibit the possession of game coming from *outside* the State, *but the right to the one is derived from the State and the title is conditional, while as to the other the title is absolute and unconditional, and it is property in every sense of the word. So long as it remains wholesome, and a valuable article of food, the property is sacred, and no person, not even the State, can question its possession or proper use.*

In the case at bar the blackcock and plover, the possession of which is complained of, were imported from European countries through the Custom House in New York City by Silz, the plaintiff in error. This was done during the open season for such birds in the State of New York. As long as they remained sound and wholesome articles of food they were his absolute property, the right to the possession of which was sacred and inviolate. Yet, see what happens under the operation of the State statute. He continues to possess them for a few weeks; in cold storage they still remain sound and wholesome articles of food; the first day of the so-called close season comes around; and he, without any affirmative act on his part, becomes a criminal liable to arrest and imprisonment by continuing to possess them.

It has been intimated that our argument on this branch of the case was met by the fact that Section 141 of the Forest, Fish and Game Law provided a method by which game imported by a citizen and possessed by him at the commencement of the close season could be lawfully kept by him until the next open season upon giving a bond; and that, therefore, there was no deprivation of property without due process of law. This, we submit, is erroneous; for

it has been universally held that the possessor of property is entitled to its beneficial use and free enjoyment, and that such use and enjoyment of property cannot be directly or indirectly affected except by due process of law. Thus, in *Foster* vs. *Scott, 136 N. Y., 577*, the Court said at page 584 :

> " Whenever a law deprives the owner of the beneficial use and free enjoyment of his property, or imposes restraints upon such use and enjoyment that materially affect its value, without legal process or compensation, it deprives him of his property within the meaning of the Constitution. All that is beneficial in property arises from its use and the fruits of that use, and whatever deprives a person of them deprives him of all that is desirable or valuable in the title and possession. It is not necessary in order to render a statute obnoxious to the restraints of the Constitution, that it must in terms or in effect authorize an actual physical taking of the property or the thing itself, so long as it affects its free use and enjoyment, or the power of disposition at the will of the owner. Though the police and other powers of government may sometimes incidentally affect property rights, according to established usages and recognized principles familiar to courts, yet even these powers are not without limitations, as they can be exercised only to promote the public good and are always subject to judicial scrutiny (Wynehamer *vs.* People, 13 N. Y., 378; People *vs.* Budd, 117 N. Y., 1; Gilman *vs.* Tucker, 128 N. Y., 190; People *ex rel. vs.* Albertson, 55 N. Y., 50; *In re* Jacobs, 98 N. Y., 98; People *ex rel. vs.* Otis, 90 N. Y., 48; People *vs.* Gillson, 109 N. Y., 389; Munn *vs.* Illinois, 94 U. S., 141; Henderson *vs.* Mayor, etc., 92 U. S., 259; *Id.*, p. 275, Brimmer *vs.* Rebman, 138 U. S., 78; Chicago, etc., *vs.* Minnesota, 134 U. S., 418; Bohan *vs.* Port Jervis G. L. Co., 122 N. Y., 18; Cooley on Con. Lim. [6th Edit.], 207, 670)."

If the free beneficial use and right of disposition of property are thus protected by the Constitution,

a State statute, which makes the mere possession of a sound and wholesome article of food a crime and imposes upon the possessor a severe penalty, is certainly a direct legislative interference with the free beneficial use and liberty of disposition of such property and as such is unconstitutional.

POINT II.

The Forest, Fish and Game Law, containing, as it does, the drastic and severe penalties, attempted to be levied on the possessors of foreign game within the State of New York, is not a proper and reasonable exercise of the police power of the State, and therefore is not in that way taken without the prohibition of the Federal Constitution against depriving the individual of his liberty or property without due process of law.

In the case of *Dobbins* v. *Los Angeles, 195 U. S., 223,* Mr. Justice Day says, at page 236:

"It is now thoroughly well settled by decisions of this Court that municipal by-laws and ordinances, and even legislative enactments undertaking to regulate useful business enterprises, are subject to investigation in the courts with a view to determining whether the law or ordinance is a lawful exercise of the police power, or whether under the guise of enforcing police regulations there has been an unwarranted and arbitrary interference with the constitutional rights to carry on a lawful business, to make contracts, or to use and enjoy property."

In *Lawton* v. *Steele, 152 U. S., 133, 137,* Mr. Justice Brown, speaking for the Court, said upon this subject:

> "To justify the State in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of

> the purpose, and not unduly oppressive upon individuals. The Legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business or impose unusual and unnecessary restrictions upon lawful occupations. *In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts.*"

And, again, in *Holden* v. *Hardy, 169 U. S., 366, 398*, the same Justice, again speaking for the Court, said:

> "The question in each case is whether the Legislature has adopted the statute in exercise of a reasonable discretion, or whether its action be a mere excuse for an unjust discrimination, or the oppression or spoliation of a particular class."

And in *Connolly* v. *Union Sewer Pipe Co., 184 U. S., 540, 558*, Mr. Justice Harlan, delivering the opinion of the Court, said:

> "The question of constitutional law to which we have referred (the equal protection of the laws) cannot be disposed of by saying that the statute in question may be referred to what are called the police powers of the State, which, as often stated by this Court, were not included in the grants of power to the General Government, and therefore reserved to the States when the Constitution was ordained. But as the Constitution of the United States is the supreme law of the land, anything in the Constitution or statutes of the States to the contrary notwithstanding, *a statute of a State, even when avowedly enacted in the exercise of its police powers, must yield to that law.* No right granted or secured by the Constitution of the United States can be impaired or destroyed by a State enactment, whatever may be the source from which the power to pass such enactment may have been derived. 'The nullity of any act

> inconsistent with the Constitution is produced by the declaration that the Constitution is the supreme law.' The State has undoubtedly the power, by appropriate legislation, to protect the public morals, the public health and the public safety, but if, by their necessary operation, its regulations looking to either of those ends amount to a denial to persons within its jurisdiction of the equal protection of the laws, they must be deemed unconstitutional and void. *Gibbons* v. *Ogden, 9 Wheat., 1,210; Sinnot* v. *Davenport, 22 How., 227, 243; Missouri, Kansas & Texas Ry.* v. *Haber, 169 U. S., 613, 626.*"

And in the case of *Mugler* v. *Kansas, 123 U. S., 623*, Mr. Justice Harlan, at page 661, says:

> "It does not at all follow that every statute enacted ostensibly for the promotion of these ends" (the protection of the public morals, health and safety) "is to be accepted as a legitimate exertion of the police powers of the State. There are of necessity limits beyond which legislation cannot rightfully go. * * *
>
> "The courts are not bound by mere forms, nor are they to be misled by mere pretences. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the Legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the Court to so adjudge, and thereby give effect to the Constitution."

Mr. Justice Peckham in the case of *Lochner* vs. *State of New York, 198 U. S., 45*, in writing the prevailing opinion of the United States Supreme Court, which reversed the decision of the New York Court of Appeals upon the question of the constitutionality of the ten hour provisions of the Labor

Law of the State of New York, defines and limits the police powers of the State as follows (Page 53):

> "There are, however, certain powers existing in the sovereignty of each State of the Union, somewhat vaguely termed police powers, the exact description and limitation of which have not been attempted by the courts. Those powers, broadly stated, and without, at present, any attempt at a more specific limitation, relate to the safety, health, morals and general welfare of the public." (Page 56): "It must, of course, be conceded that there is a limit to the valid exercise of the police powers by the State. There is no dispute concerning this general proposition. Otherwise, the Fourteenth Amendment would have no efficacy and the legislatures of the States would have unbounded power, and it would be enough to say that any piece of legislation was enacted to conserve the morals, the health or the safety of the people; such legislation would be valid, no matter how absolutely without foundation the claim might be. The claim of the police power would be a mere pretext, become another and delusive name for the supreme sovereignty of the State to be exercised free from all constitutional restraint. This is not contended for. In every case that comes before this Court, therefore, where legislation of this character is concerned and where the protection of the Federal Constitution is sought, the question necessarily arises: Is this a fair, reasonable and appropriate exercise of the police power of the State, or is it an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty? * * * This is not a question of substituting the judgment of the Court for that of the Legislature. If the act be within the power of the State it is valid, although the judgment of the Court might be totally opposed to the enactment of such a law. But the question would still remain: Is it within the police power of the State? And that question must be answered by the Court."

Following the reasoning of the authorities just quoted, and reducing the case at bar to the concrete, we are brought face to face with this question: Is it a fair, reasonable and proper exercise of the police power of the State for it to prohibit the possession of a sound, wholesome and inherently harmless article of food, such as was the imported game in this case, and to make such possession a crime and subject to heavy penalties? The mere asking of this question would seem to suggest the answer.

It may be admitted that the States, in the exercise of the police power, can enact laws for the protection of game in general; but the question always remains: Is the particular game law complained of within the police power of the State? The mere fact of saying that it is within the police power does not make it so, and the Legislature is not the sole judge as to whether such a law is within the police power of the State or not. The question before this Court is, therefore, whether the Legislature of the State of New York, claiming to act under the police power of the State, can frame a law so as to prohibit and restrict, by penal provisions, the importation and possession of sound and wholesome articles of food, in universal use as such. If the Legislature could enact such a law under the claim that the enactment of game laws in general was within the police powers of the State, there would be no limit to which the Legislature could not go in the supposed protection of game, no matter how arbitrary and unjnst such a law would be. As, for instance, the Legislature might pass a law forbidding any one to cut down trees on his land, on the theory that it was necessary to maintain groves and forests in order to foster the propagation of the game and wild birds of the State.

Surely the mere possession of these birds is not such a menace to the public safety, health or morals as would justify such an oppressive and drastic law. Confined in the relator's cold storage warehouse,

and only suffered at large securely packed with ice in a strong box, this game, dead and frozen (wholesome, but strangers in a strange land, did not endanger the public morals or the public safety. In their helpless condition the police power of the State could properly lie dormant. They were powerless to do wrong or to be used as an instrument of wrong, but could only benefit and nourish mankind. By harboring them the defendant did not become a criminal but exercised a constitutional right of property. Every citizen has the right to import and place upon his table for his family use any article of food known to be wholesome, and any law that deprives him of that right infringes upon the liberty guaranteed to him by the Constitution.

Indeed, the only theory on which such a measure is sought to be justified is on that suggested by the Court of Appeals to the effect, that in order to prevent evasion, fraud and perjury the Legislature may prohibit the possession of game in this State during the close season, even if it was taken in another State and brought here during the open season. In answer to this contention we need only quote the language used by Judge O'Brien in the *Buffalo Fish Co. case* (164 New York, 93), where he said, at page 99:

> "This argument seems to be based upon the opinion that unless the innocent are convicted the guilty may escape. It assumes that in the interpretation of a penal statute such a remote danger must be anticipated and guarded against. I think it puts too much faith in the potency of perjury as a defense to an honest claim, and too little in the capacity of courts and juries to distinguish truth from falsehood. When it was proposed to change the criminal law and permit an accused person to testify in his own behalf the proposition was for a long time resisted by similar arguments. It was said that the temptation to swear falsely under such cir-

> cumstances was so great that crime could never be punished if the accused were permitted to testify in his own behalf. Whereas, experience has shown that a person on trial for a penal offense very rarely, if ever, helps his case by falsehood. Indeed, it may be safely asserted that the new law, instead of thwarting justice as anticipated, has been a great aid in the enforcement of the criminal law."

The person in whose possession the forbidden game was found could be made to show his invoices and custom receipts, and thus effectually prevent any unfounded claim being made by him that the game was foreign, when in reality it was native. The burden would always be upon the defendant, to show that the game found in his possession was not domestic game in order to establish his defense.

Moreover, in the case at bar there is no necessity whatever for such a provision to prevent perjury, for the reason that the imported birds, the possession of which is complained of, although belonging to the same general families as some native birds, resemble no native bird and could easily and readily be distinguished from any game birds found either in New York State or in America. In fact, there is just as much danger of confusing the birds, the possession of which is complained of in this case, with chickens of the same size as with any of the game birds of this State. In the record, it is admitted by both sides, that the imported golden plover and imported black cock are entirely different varieties of game birds from the game birds known as plover and grouse in the State of New York or from any bird native to the State of New York or to America, that they are different in form, size, color and markings from the game birds known as plover and grouse in the State of New York and from any American bird and can be easily and readily distinguished from such plover and grouse found in the

State of New York and from any bird native to America, both with their feathers on and after they are plucked.

We wish to draw the Court's attention to this agreed statement of fact, in view of the doubt attempted to be cast upon it by Judge Cullen, in his opinion in the Court of Appeals. At the time that Silz was arrested, the learned Acting District Attorney of Kings County and also the Attorney General of the State of New York investigated this statement of fact and consulted with the experts connected with the Metropolitan Museum of Natural History in New York City and also with Columbia College in New York City, and found that this statement of fact was true. Furthermore, in a case tried before Mr. Justice Greenbaum and jury in the Supreme Court of New York, New York County, this very question of fact was raised and submitted to the jury by Mr. Justice Greenbaum; and the jury found as a fact, answering a specific question submitted to them by the Judge, that these birds were different from any game birds found in New York State, and differed so much in size, color, markings, and color of the meat, that they could be readily distinguished and recognized by any one that was conversant with the different varieties of game.

In the game law passed by the New York State Legislature there are provisions prohibiting the possession of pheasants during certain periods of the year, yet, when plucked, some of these pheasants resemble the ordinary barn yard game chickens very much more than the black cock and imported golden plover, complained of in this case, resemble the grouse and plover to be found in the State of New York. Yet could it be claimed that, in order to protect pheasants and in order to prevent evasion, fraud and perjury, the possession of game chickens in the State of New York could be made a crime and subject to heavy penalties.

Even Judge Cullen himself admits that this could not be done, when he says in the last paragraph of his opinion:

"To protect pigeons, turkeys could not be excluded."

Would the learned Judge contend that in order to protect wild turkeys, the possession of domesticated turkeys could be made a crime? Yet, when plucked, the difficulty of distinguishing the wild from the domesticated turkey is very much greater than that of distinguishing the black cock and golden plover, imported in the case at bar, from the native American grouse and plover.

The point which we wish to impress upon this Court is that there is *absolutely no danger of confusion* between the imported birds complained of in the case at bar and any of the native game birds. In the case which we referred to, which was tried before Mr. Justice Greenbaum, we, in succession, put on the stand scientists who had made the study of birds the work of a lifetime, importers, dealers in poultry, butchers and chefs, and they all testified that they could, without any difficulty whatsoever, distinguish the foreign birds from the native ones, both before and after they were plucked. This being the case, the only reason that has been advanced by the supporters of this law to sustain its validity fails absolutely, and they are left in the position of prohibiting the possession of a perfectly sound and wholesome article of food, used daily by a large part of the community, for no reason whatever, except the mere, general and nebulous contention that it tends to protect game in the State.

When this contention is examined, it will be found not only without foundation in fact or in experience, but when applied to cases like the one at bar the manifest tendency is to defeat the very object of the law. The game law that cuts off the supply from abroad diminishes rather than increases and protects the supply at home. Legislation that

prohibits the defendant from drawing a supply of game from Europe during the close season furnishes a strong temptation to procure it from this State, even in violation of the law. The majority of people want and are entitled to the game course at dinner; nothing else can quite take the place of it. Surely it cannot be a crime for them to buy it abroad, where the law permits it, and to import and consume it in this State, where they are resident. How is the public health, safety, morals or welfare injured by such a proceeding? If it be a good thing for the welfare of the people of the State that the native game be preserved intact during certain seasons of the year, so that during the open season all may enjoy it in abundance, the use of imported game during the close season will tend to such preservation, and will at the same time tend to conserve the morals of the people; for, as pointed out before, the average citizen, with the price, cannot understand why he cannot have his game as well as any other article of food, and if he cannot get imported game during the close season, he will be strongly tempted to get domestic even in violation of the law.

The legislator who would protect the forests of this State by prohibiting the importation of lumber or timber from Canada or other foreign countries would be rated as a visionary theorist, but that is the principle upon which the argument for the People in this case proceeds for the protection of fish and game. Is it not an exactly parallel case? The protection and preservation of the forests of the State is as much within the police power as the protection of game. Yet if the Legislature should pass a law prohibiting the cutting of timber from the State forests within a period of ten years and making it a misdemeanor for any one to possess timber of the particular varieties grown in the State forests during such close period, although brought from abroad, such a law would undoubtedly be declared unconstitutional.

Chief Justice Cullen, in his opinion in the Court of Appeals in the case at bar, says (Record, pp. 41 and 42),

> "To the argument that the exclusion of foreign game in no way tends to the preservation of domestic game, it is sufficient to say that substantially the uniform belief of legislatures and people is to the contrary, and both in England and many of the States in this country, legislation prohibiting the possession of foreign game during the close season has been upheld as being necessary to the protection of domestic game, on the ground that without such inhibition or restriction any law for the protection of domestic game could be successfully evaded."

We do not think that the learned Judge is entirely accurate in this statement; for the English case of *Whitehead* v. *Smithers, L. R. (2, Common Pleas Division), 553,* which Judge Cullen cites in support of the statement, has been overruled by the case of *Guyer* v. *The Queen,* decided April 13, 1889, in the Queen's Bench Division, High Court of Justice, and reported in English Law Reports, Queen's Bench Division, vol. 23, page 106. In this case Guyer was charged with offering for sale two partridges which were imported into England by him from Russia. The Court held that under the English statute he could not be convicted upon such a charge and that he had a right to import and sell such foreign birds, even although the sale of native game birds was prohibited.

Furthermore, the following cases are authorities directly in point against the doctrine contended for by Judge Cullen, and are in direct opposition to the cases cited by him in support of his statement:

Territory vs. *Evans, 2 Idaho, 658.*
Kansas vs. *Saunders, 19 Kansas, 127.*
Commonwealth vs. *Wilkinson, 139 Penn. St., 304.*

Commonwealth vs. *Hall*, *128 Mass.*, *410.*
People vs. *O'Neill*, *71 Mich.*, *325.*
In re Davenport, *102 Fed. Rep.*, *540.*
People vs. *Buffalo Fish Co.*, *164 N. Y.*, *93.*
Commonwealth vs. *Paul*, *148 Penn. St.*, *559*, *at 562.*
Allen vs. *Young*, *76 Maine*, *80.*
State vs. *Bucknam*, *88 Maine*, *385*, *at 392.*
Dickhaut vs. *State*, *85 Md.*, *451.*
Davis vs. *McNair* (*June*, *1885*, *Canada*), *7 Crim. L. Mag.*, *213*, *21 Cent. L. J.*, *480.*
State vs. *McGuire*, *24 Oregon*, *366.*

Furthermore, we submit that the opinion of the most advanced thinkers amongst those who are trying to preserve the game supply of the State is that the exclusion of foreign game in no way tends to the preservation of domestic game. It is a misnomer to call the game birds imported from Europe "wild game" for they are essentially "tame game." They are raised in preserves there and housed and fed by their owners, who kill them and send them to market. Indeed the solution of the preservation of native game is believed to lie in the propagation of game upon game farms, whose owners shall have the right to market their product at any season of the year. In this connection we wish to draw the Court's attention to the *Farmers Bulletin*, No. 330, published by the United States Department of Agriculture on July 29, 1908. At page 5, the following statement is made:

> "The raising of vension should be and is naturally as legitimate a business as the growing of beef or mutton, and State laws should be so modified as to permit the producer who has stocked a preserve with deer at private expense to dispose of his product

at any time, under reasonable regulations, either for breeding purposes or for food.

"The growing scarcity of game mammals and birds in the United States, and the threatened extinction of some of them over large parts of their present ranges, make the preservation of the remnant highly important. Very important also is the increase of this remnant, so as to make game once more abundant. It is believed that by means of intelligent game propagation, both by the states and by private enterprise, many of our depleted ranges can be restocked with big game."

And further, at page 20:

"Instead of hampering breeders by restrictions as at present, State laws should be so modified as to encourage the raising of deer, elk and other animals as a source of profit to the individual and to the State.

"Safeguards against the destruction and sale of wild deer in place of domesticated deer are not difficult to enforce. For this purpose a system of licensing private parks, and of tagging deer or carcasses sold or shipped, so that they may be easily identified, is recommended."

We therefore conclude that the provisions of the Forest, Fish and Game law, when applied to such a case as the one at bar, violate the Federal Constitution by depriving the individual of his liberty and property without due process of law; and that they are not taken without the prohibition of Federal Constitution by the contention that they were enacted under the police power of the State; because such provisions do not constitute a fair, reasonable and appropriate exercise of the police power, but are unnecessary, unreasonable and arbitrary interferences with the rights and liberties of the individual.

POINT III.

Section 5 of the "Lacey Act," which is the operative portion of the Act in reference to the effect of the State Game Laws, has no application to game birds imported from foreign countries.

It will no doubt be conceded that without the aid of the "Lacey Act," the provisions of the Forest, Fish and Game Law of the State of New York, in so far as they attempt to prohibit the possession by an importer of game birds coming from without the State, are void, because they are repugnant to the commerce clause of the Federal Constitution.

Bowman v. *Chicago & Northwestern Railway Co., 125 U.S., 465.*
Leisy v. *Hardin, 135, U. S., 100.*

Consequently, if we are able to convince this Court that the provisions of Section 5 of the "Lacey Act," whatever their effect may be upon interstate commerce, can have no application whatsoever to foreign commerce in such game birds as were possessed by the relator here, then, under the cases just cited, this Court will be bound to hold the Forest Fish and Game Law unconstitutional.

Section 5 of the "Lacey Act" (31 U. S. Stat. at Large, Chap. 553), is as follows:

> "Section 5. That all dead bodies or parts thereof, of any foreign game animals, or game or song birds, the importation of which is prohibited, or the dead bodies, or parts thereof, of any wild game animals, or game or song birds transported into any state or territory, or remaining therein for use, consumption, sale, or storage therein, shall upon arrival in such state or territory be subject to the operation and effect of the laws of such state or territory enacted in the exercise of its

> police powers, to the same extent and in the same manner as though such animals and birds had been produced in such state or territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise. This act shall not prevent the importation, transportation or sale of birds or bird plumage manufactured from the feathers of barnyard fowl."

It will be seen that this section provides for two classes of game, which, upon arrival within the State, become subject to the State law.

First, "all dead bodies, or parts thereof, of any *foreign* game animals, or game or song birds, the *importation* of which is prohibited;" and,

Second, "the dead bodies, or parts thereof, of any wild game animals, or game or song birds *transported* into any state or territory, or remaining therein for use, consumption, sale or storage therein."

Upon examination, it is clear that the game imported by the relator in the case at bar does not come within the first class, for the reason that no where, either in the "Lacey Act," or in any other statute of the United States, or by any order of the United States Department of Agriculture, is the importation of black cock or golden plover prohibited; and, moreover, it is conceded that the *importation of these birds was lawful and was allowed by the customs authorities, and, therefore, could not have been prohibited by the "Lacey Act" or any other statute or by any order of the Secretary of the Department of Agriculture.*

Consequently if the game imported by the relator is subject to the provisions of the "Lacey Act" at all, it would come under the second class noted above; but that class has no relation to birds or game imported from foreign countries. It is only applicable to birds or game killed within the United States in violation of the local laws and transported from one State or Terri-

tory to another. This is shown by referring to Se c tion 3 of the "Lacey Act." Moreover, in the case at bar, the game birds were not *transported* into any State or Territory; they were *imported* into New York State.

That the game birds in the case at bar are not embraced in the second class above noted is further shown by the use of the word "foreign" in reference to the first class of game animals or birds and the entire omission of the word "foreign" in reference to the second class. Furthermore, if the second class above noted is broad enough to include both foreign and domestic game, as is claimed by Judge Miller in his dissenting opinion in the Appellate Division of the Supreme Court (Record, p. 20), then we are tempted to ask what is the use at all of the first class. It has no meaning. If the second class is so broad that it includes any kind of game, native or foreign, what in the world was the use of Congress specifically describing the first class? Such a construction would give absolutely no meaning to the attempted differentiation by Congress of the two classes of game.

In the case of the *American Steel Co.* v. *Speed, 192 U. S., 500*, at page 520, the Court points out very clearly the distinction between articles "imported" and articles "shipped," holding that "imports," in the constitutional sense, embraces only goods brought from foreign countries, and consequently does not include merchandise "shipped" from one State to another. The same distinction is apparent in the two classes of game embraced in Section 5 of the "Lacey Act;" in the first class, the word "importation," being used in connection with the word "foreign," clearly showing that it relates to certain prohibited importations of game from foreign countries; and in the second class the word "transported," which is equivalent to "shipped," without the use of the word "foreign," clearly showing that it relates to

game coming from within the States or Territories of the United States.

The title of the Act is also significant on this point. It is an act

> "to enlarge the powers of the Department of Agriculture;"
>
> "to prohibit the transportation by interstate commerce of game killed in violation of local laws;"
>
> "and for other purposes."

Observe how the word "transportation" is used in connection with "interstate commerce," also how the word "game" is qualified, *i. e.*, game "killed in violation of local laws."

Notice, also, the last clause of Section 5 of the "Lacey Act," which is as follows: "This Act shall not prevent the importation, transportation or sale of birds, or bird plumage manufactured from the feathers of barnyard fowl." See how the word "transportation" is used in opposition to "importation."

As Judge Woodward said in the prevailing opinion when the case at bar was in the Appellate Division of the Supreme Court (Record, p. 16):

> "Without going into an analysis of the statutes, it is plain that, in so far as the Federal statute has any bearing whatever, it must relate to interstate and not to foreign commerce, and we are dealing with a conceded article of foreign commerce, with an article the importation of which is not prohibited. Articles which may be imported under the customs laws and regulations of the United States are within the exclusive jurisdiction of Congress (U. S. Const., Art. 1, § 8), and it is not attempted, in the so-called Lacey Act, to place them under the police regulations of the States. All game animals or birds, 'the importation of which is prohibited' by the customs laws or regulations of the United States, are placed upon the same footing as 'the dead bodies or parts thereof of any wild game ani-

> mals, or game or song birds, transported into any State or Territory,' the word 'transported' being used in the sense of shipped from one State to another, but this, by necessary implication, excludes from State control those game birds, etc., the importation of which is not prohibited. As to these, Congress has provided for their importation, and, as O'Brien, *J.*, so well said in *People* v. *Buffalo Fish Co.* (*supra*), 'the State had no power to extend its police legislation to such a transaction, and, of course, had no power to forbid what Congress had expressly permitted.'"

Thus we see that Congress did not by the enactment of the Lacey Act intend to delegate to the State any power which would, by the passage of any law such as the one complained of here, tend to give the individual State the right to regulate or restrict foreign commerce.

Nor do we think that Congress has the right under the Constitution, even if it had so intended, to redelegate to the individual State any power which would enable the State to restrict foreign commerce, for, as Mr. Justice Matthews said in the case of *Bowman* v. *Chicago Railway Co.*, *125 U. S.*, *465*, *at page 482:*

> "Laws which concern the exterior relations of the United States with other nations and governments are general in their nature, and should proceed *exclusively* from the legislative authority of the nation. The organization of our State and Federal system of government is such that the people of the several States can have no relations with foreign powers in respect to commerce or any other subject, except through the Government of the United States. (*Henderson* v. *Mayor of New York*, *92 U. S.*, *259*, *273*). The same necessity perhaps does not exist equally in reference to commerce among the States."

In the Henderson case (*supra*), Justice Miller, while speaking of the grant of the power to regu-

late foreign commerce by the Federal Constitution to Congress, says, at page 272:

> "These decisions, however, all agree that under the commerce clause of the Constitution, or within its compass, there are powers, which, from their nature, are exclusive in Congress; and in the case of *Cooly* v. *The Board of Wardens*, it was said, that 'whatever subjects of this power are in their nature national, or admit of one uniform system or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress.' A regulation which imposes onerous, perhaps impossible, conditions on those engaged in active commeree with foreign nations, must of necessity be national in its character. It is more than this, for it may properly be called *international.* It belongs to that class of laws which concern the exterior relation of this whole nation with other nations and governments. If our government should make the restrictions of these burdens on commerce the subject of a treaty, there could be no doubt that such a treaty would fall within the powers conferred on the President and the Senate by the Constitution. It is in fact, in an eminent degree, a subject which concerns our international relations, in regard to which foreign nations ought to be considered and their rights respected, whether the rule be established by treaty or by legislation. It is equally clear that the matter of these statutes may be and ought to be, the subject of a uniform system or plan. The laws which govern the right to land passengers in the United States from other countries ought to be the same in New York, Boston, New Orleans and San Francisco."

Moreover, Congress, while it had an interest to protect the game of all the States of the Union, had absolutely no interest or purpose to protect the game of a foreign country, and therefore made the Lacey Act applicable only to the game that might be

caught in any of the States of the Union and shipped to other States in violation of local laws, but did not make it applicable to game which was imported from abroad through the custom house, the importer complying with all the Federal regulations. Congress has expressly permitted the importation of the game in question and the United States authorities have allowed it to pass through the United States Custom House in New York, therefore it would be absurd to contend that Congress intended that the State Legislature should pass a law making it a crime for a citizen of the State to receive it and possess it immediately upon its receipt from abroad, thereby practically excluding a recognized, wholesome and inherently harmless article of foreign commerce.

POINT IV.

The provisions of the Forest, Fish and Game law are unconstitutional in that they unjustifiably restrict and interfere with foreign commerce.

In the case of *Bowman* v. *Chicago Railway Co.*, *125 U. S., 465*, decided March 19, 1888, the plaintiff, Bowman, offered the defendant Railway Company 5,000 barrels of beer to be shipped over its line. The defendant refused to ship the same on account of a statute of Iowa which forbade any common carrier to bring within the State of Iowa any intoxicating liquors from any other State or Territory without a certificate certifying that the consignee, or the person to whom the liquor was to be transported, was authorized to sell intoxicating liquors in his county. The Court held that the statute of Iowa was unconstitutional, because it was repugnant to the commerce clause of the Federal Constitution, and that the right of importation, guaranteed by the Federal Constitution, carried with it the right to sell the article imported.

In the case of *Leisy* v. *Hardin*, *135 U. S., 100*, decided April 28, 1890, the plaintiff brought an action of replevin against the defendant, who was a marshal of the City of Keokuk, Iowa, to recover certain barrels of beer which had been seized by the defendant on behalf of the State of Iowa, under certain provisions of the Code of the State of Iowa. The beer had been transported by the plaintiff from Peoria, Ill., by means of railway to Keokuk, in sealed kegs. The beer was then offered for sale and sold in Keokuk in the original sealed kegs. The statute of Iowa, by which the defendant attempted to defend his seizure, provided that no person should manufacture or sell, directly or indirectly, any intoxicating liquors, and the keeping of intoxicating liquors, with the intent upon the part of the owner

to sell the same within the State of Iowa, was prohibited, and the intoxicating liquor so kept was declared a nuisance and subject to forfeiture. The Court held that the plaintiff had a right to import the beer into the State and the right to sell it in the original package, and that up to that point of time the State had no power to interfere with or prohibit the sale by the importer.

In order to counteract the effect of these two decisions Congress passed an Act in August, 1890, known as the "Wilson Act" (26 U. S. Stat. at Large, 313, Chap. 728), upon which the "Lacey Act" is modeled. The "Wilson Act" is as follows:

> "That all fermented, distilled or other intoxicating liquors or liquids transported into any state or territory, or remaining therein for use, consumption, sale or storage therein, shall, upon arrival in such state or territory, be subject to the operation and effect of the laws of such state or territory enacted in the exercise of its police powers to the same extent and in the same manner as though such liquids or liquors had been produced in such state or territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."

In the case of *In re Rahrer, 140 U. S., 545*, which arose immediately after the passage of the "Wilson Act," and which was decided May 25, 1891, Rahrer, a citizen of Topeka, Kansas, on August 9, 1890, offered for sale and sold one pint of whisky, which he had received from Maynard, Hopkins & Co., dealers in Kansas City, Missouri. The whisky was sold in the original package. Rahrer was arrested for the sale of this liquor in violation of a statute of Kansas, which prohibited any person from manufacturing, selling or bartering intoxicating liquors, and provided that any one so doing should be guilty of a misdemeanor. The Court held that the statute of Kansas was constitutional, and that, aided by the "Wilson Act," a State could enact a

statute forbidding the sale of liquors imported from other States, even if they were sold in the original packages.

In the case of *Rhodes* v. *Iowa, 170 U. S., 412*, decided May 9, 1898, the plaintiff, Rhodes, who was a station agent of the Burlington & Western Railway Co., in the discharge of his duties moved a box containing intoxicating liquors into a freight house belonging to the railroad company. He was arrested under the provisions of a statute of Iowa which prohibited any common carrier from transporting or conveying between points, or from one place to another, within the State of Iowa, any intoxicating liquors. The box of intoxicating liquors in question was shipped by railway from a point in Illinois to a citizen in Iowa at his residence in that State. The moving of the box in question, for which Rhodes was arrested, took place during the transit. The Court held that "arrival" in the State under the "Wilson Act" meant arrival at the destination within the State and delivery there to the consignee, and that Congress had not empowered the States to punish those engaged in effecting transportation under an interstate shipment, and that therefore the statute of Iowa was unconstitutional. In this case the Court also held that the "Wilson Act" did not justify the State in interfering with the right of the importer of liquors to retain them for his own use. At page 423, the Court says:

> "It is reasonable to infer that the provisions of the act (Wilson Act) were intended by Congress to cause the legislative authority of the respective States to attach to intoxicating liquors coming into the States by an interstate shipment, only after the consummation of the shipment, but before the sale of the merchandise, that is, that the one receiving merchandise of the character named should, whilst retaining the full right to use the same, no longer enjoy the right to sell free from the restrictions as to sale

> created by state legislation, a right which the decision in *Leisy vs. Hardin* had just previously declared to exist."

And, further, at page 426, the Court continues:

> "We think that, interpreting the statute by the light of all its provisions, it was not intended to and did not cause the power of the State to attach to an interstate commerce shipment whilst the merchandise was in transit under the shipment, and until its arrival at the point of destination and delivery there to the consignee, and of course this conclusion renders it entirely unnecessary to consider whether, if the Act of Congress had submitted the right to make interstate commerce shipments subject to state control, it would be repugnant to the Constitution."

In the case of *Vance v. Vandercook, 170 U. S., 438*, decided May 9, 1898, the Court specifically held that it was not within the power of the State, even when reinforced by the "Wilson Act," to deprive a resident of one State of the right to ship liquor into another State to a resident for his own use. The Court upheld both the right of the shipper in the one State to ship and the right of the resident in the other to import, receive and possess such liquor, saying that the right of persons in one State to ship liquor into another State to a resident for his own use, and, on the other hand, the right of the resident to receive and possess such liquor, is derived directly from the Constitution of the United States and does not rest on the grant of the State law.

Ignoring, for the present, the intrinsic difference between a sound and wholesome and inherently harmless article of food, such as were the game birds in the case at bar, and spirituous liquors, which contain their vice inherent in themselves, and the possession and sale of which have always been recognized as coming within the police power of the State, and admitting for the purpose of argument, that the "Lacey Act" applies to shipments of game

from European countries, it is clear that, under the authorities just discussed,

(1) *The relator in the case at bar had the right both to import and possess for his own use within this State the birds complained of, and*

(2) *The State statute, in so far as it applies to those engaged in effecting the transportation of the game in question to its destination within the State and delivery there to the consignee, and in so far as it may be deemed to prohibit the receipt and retention of such birds by those who have imported them for their own use, is unconstitutional and void.*

In the case at bar, it does not appear whether the birds remained in the original packages or not; but in our opinion this does not make any difference where the *possession* of the prohibited birds is the thing complained of. The breaking of the original package, by commingling the birds with the general mass of property within the State, might give the State the right to tax such imported birds, even while in the hands of the importer, and might further, if the State had so enacted, prevent the sale of the birds by an importer, but it could not prevent the mere possession of the birds by the importer. The case of *Vance v. Vandercook, supra*, specifically upholds the right of a resident of a State to import and possess such birds, whether in an original package or not, for his own use. It is true, that in the case at bar it does not appear for what purpose the importer had the birds in his possession, but this makes no difference whatsoever under the law as it stands in this case. For even if it was admitted that the relator had the birds in his possession for the purpose of sale, still we contend that he was not guilty of an unlawful act.

For, if possession by the importer for his own use is not unlawful, it would seem to follow that his

possession, not being, *per se*, a subject of State interdiction, could be made criminal only as connected with some purpose which the State was entitled to prohibit, and, in fact, had prohibited. The plaintiff in error has been held for the crime of *possessing* one imported blackcock and one imported golden plover. He has not been held for *selling or offering for sale* the birds in question. Nowhere in the Act is the sale of these imported birds prohibited; the Act is entirely bare of any prohibition against the sale of game birds coming from without the State.

The provisions of the Forest, Fish and Game Laws of the State of New York, as originally passed, applied only to game coming from within the State. This has been specifically so held by the Court of Appeals of the State of New York in the case of the *People v. Buffalo Fish Co.*, 164 *N. Y.*, 93. After this decision Section 141 of the Forest, Fish and Game Law was added, the first clause of which section is as follows:

> "Section 141. Whenever within this Act the *possession* of fish or game or the flesh of any animal, bird or fish, is prohibited, reference is had equally to such fish, game or flesh coming from without the State as to that taken within the State."

This section of the statute, which attempts to make the provisions of the statute applicable to birds coming from without the State, as well as to those coming from within, only applies to violations of the statute by *possession* of the prohibited birds. Nothing whatever is said of the *sale* of game coming from without the State. The statute is a penal one, and in accordance with familiar rules, its definition of what is criminal should not be extended. Possession and sale are different things; and while a valid prohibition of the former might practically prevent the latter, it would be impos-

sible under this statute to convict upon an indictment charging a party with selling imported birds.

Consequently, possession by an importer of dead game birds lawfully acquired for the purpose of sale would not be possession for an unlawful purpose, and hence the question is, whether the legislature can make the mere possession of such birds by an importer a crime. Assuming that the legislature might prohibit their sale, it has not so enacted; and as an importer has a constitutional right, under the decisions heretofore referred to, to receive articles of commerce under a foreign shipment, it is clear that the effort of the State to make criminal his mere possession, without reference to any contemplated disposition of such articles in violation of law, is in contravention of the commerce clause of the Federal Constitution, and therefore nugatory and void.

POINT V.

The provisions of the Forest, Fish and Game Law, making the possession of a pure and wholesome article of food, such as was the imported game in the case at bar, a crime, are not within the police power of the State, and in that way taken without the operation of the commerce clause of the Federal Constitution.

At the outset of this discussion we wish to draw the Court's attention to the radical distinction between a pure, wholesome and inherently harmless article of food, such as were the game birds in the case at bar, and intoxicating liquors This Court has frequently held that laws, enacted by the State legislatures regulating the possession and sale of intoxicating liquors, are within the police power of the State, on account of the injury done to the health and morals of the community by the use of such liquors. The reason for such a rule is because the vice is inherent in the intoxicating liquor itself. But this is not so in the case of a pure, wholesome and inherently harmless article of food. The imported game birds in the case at bar could neither do any wrong themselves, nor become the instrument of any harm or injury to either the health or morals of the community.

As we pointed out in the cases discussed on pages 12 to 15 of this brief, the exercise of the police power of the State is subject to constitutional limitations, and the question whether these limitations have been exceeded is a matter for judicial determination. It does not at all follow that every statute enacted ostensibly for the promotion of the public morals, health, safety and welfare is to be accepted as a legitimate exercise of the police powers of the State. There are, of necessity, limits beyond which

legislation cannot rightfully go. The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—and indeed are under solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, public morals or the public safety, has no real or substantial relation to those objects, it is the duty of the Court to so adjudge and thereby give effect to the Constitution.

Mugler v. *Kansas City, 123 U. S., 623, 661.*

Dobbins v. *Los Angeles, 195 U. S., 223, 236.*

Lawton v. *Steele, 152 U. S., 133, 137.*

Holden v. *Hardy, 169 U. S., 366, 398.*

Connolly v. *Union Sewer Pipe Co., 184 U. S., 540, 558.*

Lochner v. *State of New York, 198 U. S., 45, 53.*

As Tiedeman says in his work upon the "Limitations of Police Power," at page 4:

> "Any law which undertakes to abolish rights, the exercise of which does not involve an infringement of the rights of others, or to limit the exercise of rights beyond what is necessary for the public welfare and general security, cannot be included in the police power of the Government. It is a governmental usurpation and violates the principles of abstract justice as they have been developed under our republican institutions."

It is admitted in the case at bar that the imported golden plover and imported blackcock possessed by the relator were and are staple, sound, wholesome and valuable articles of food, and are in constant use as such, and are recognized and staple articles of

commerce between the different countries of Europe and the United States of America, and that the fair market value of the birds is $1.50 (record, fol. 3).

The State has an unquestioned right to provide for a reasonable inspection of imported foods so as to insure the marketing of pure foods only, but this statute is not an inspection law, and it is conceded that the imported game in question was in proper condition and entirely wholesome, and was duly imported through the Custom House in New York City, the relator having complied with all the rules and regulations of the United States relative to such importation.

The United States Government allowed and permitted the importation of these game birds through its Custom House. The State law makes it a crime for the importer to possess these birds upon arrival in this State. To say that Congress may permit the introduction by foreign importation of a wholesome article of food, which it is a crime to possess upon arrival, seems to us an absurdity in government. How can an importer lawfully take from a ship articles of commerce which Congress has allowed him to import when the State law makes it a crime to possess them? The so-called police power, which attempts to penalize possession upon arrival of that which it is lawful to import from a foreign country, is *per se* a power of exclusion. Possession is a necessary incident to the right of importation and to the title of the property imported. Possession by the importer is the necessary and intended consequence of the right of importation. It would as effectually destroy the privilege of importation to make the intended consequence thereof unlawful as to prohibit the importation itself.

Upon this point the remarks of Chief Justice Marshall in the case of *Brown* v. *Maryland, 12 Wheaton, 419*, are most pertinent. At page 442 the great Chief Justice says:

> "The counsel for the plaintiffs in error contend that the importer purchases, by pay-

ment of the duty to the United States, a right to dispose of his merchandise as well as to bring it into the country, and certainly the argument is supported by strong reason as well as by the practice of nations, including our own. The object of importation is sale; it constitutes the motive for paying the duties, and if the United States possess the power of conferring the right to sell as the consideration for which the duty is paid every principle of fair dealing requires that they should be understood to confer it. The practice of the most commercial nations conforms to this idea. Duties, according to that practice, are charged on those articles only which are intended for sale or consumption in the country. Thus, sea stores, goods imported and re-exported in the same vessel, goods landed and carried over land for the purpose of being re exported from some other port, goods forced in by stress of weather, and landed, but not for sale, are exempted from the payment of duties. The whole course of legislation on the subject shows, that, in the opinion of the Legislature, the right to sell is connected with the payment of duties."

Judge Marshall further says, at page 445:

"Is it also repugnant to the clause in the Constitution which empowers 'Congress to regulate commerce with foreign nations, and among the several states and with the Indian tribes?'

"The oppressed and degraded state of commerce previous to the adoption of the Constitution can scarcely be forgotten. It was regulated by foreign nations with a single view to their own interests; and our disunited efforts to counteract their restrictions were rendered impotent by want of combination. Congress, indeed, possessed the power of making treaties; but the inability of the Federal Government to enforce them had become so apparent as to render that power in a great degree useless. Those who felt the injury arising from this state of things, and those who were capable of estimating the influence

of commerce on the prosperity of nations, perceived the necessity of giving the control of this important subject to a single government. It may be doubted whether any of the evils proceeding from the feebleness of the Federal Government contributed more to that great revolution which introduced the present system, than the deep and general conviction that commerce ought to be regulated by Congress. It is not, therefore, matter of surprise, that the grant should be as extensive as the mischief, and should comprehend all foreign commerce, and all commerce among the States. To construe the power so as to impair its efficacy, would tend to defeat an object, in the attainment of which the American public took, and justly took, that strong interest which arose from a full conviction of its necessity.

What, then, is the just extent of a power to regulate commerce with foreign nations and among the several States?

This question was considered in the case of *Gibbons* v. *Ogden* (*9 Wheat. Rep., 1*), in which it was declared to be complete in itself, and to acknowledge no limitations other than are prescribed by the Constitution. The power is coextensive with the subject on which it acts, and cannot be stopped at the external boundary of a State, but must enter its interior.

We deem it unnecessary now to reason in support of these propositions. Their truth is proved by facts continually before our eyes, and was, we think, demonstrated, if they could require demonstration, in the case already mentioned.

If this power reaches the interior of a State, and may be there exercised, it must be capable of authorizing the sale of those articles which it introduces. Commerce is intercourse; one of its most ordinary ingredients is traffic. It is inconceivable that the power to authorize this traffic, when given in the most comprehensive terms, with the intent that its efficacy should be complete, should cease at the point when its continuance is indispensable to its value. To what purpose

should the power to allow importation be given, unaccompanied with the power to authorize the sale of the thing imported? Sale is the object of importation, and is an essential ingredient of that intercourse, of which importation constitutes a part. It is as essential an ingredient, as indispensable to the existence of the entire thing, then, as importation itself. It must be considered as a component part of the power to regulate commerce. Congress has a right, not only to authorize importation, but to authorize the importer to sell.

If this be admitted, and we think it cannot be denied, what can be the meaning of an act of Congress which authorizes importation, and offers the privilege for sale at a fixed price to every person who chooses to become a purchaser? How is it to be construed, if an intent to deal honestly and fairly, an intent as wise as it is moral, is to enter into the construction? What can be the use of the contract, what does the importer purchase, if he does not purchase the privilege to sell?

What would be the language of a foreign government, which should be informed that its merchants, after importing according to law, were forbidden to sell the merchandise imported? What answer would the United States give to the complaints and just reproaches to which such an extraordinary circumstance would expose them? No apology could be received, or even offered. Such a state of things would break up commerce. It will not meet this argument, to say, that this state of things will never be produced; that the good sense of the States is a sufficient security against it. The Constitution has not confided this subject to that good sense. It is placed elsewhere. The question is, where does the power reside? not, how far will it be probably abused. The power claimed by the State is, in its nature, in conflict with that given to Congress; and the greater or less extent in which it may be exercised does not enter into the inquiry concerning its existence."

The State cannot, through the exercise of the police power, control foreign commerce, and the constitutional guaranty of the freedom of such commerce under the regulations of Congress does not merely secure the right of transportation and the delivery to consignees within the State of articles of commerce, and the right of residents of the State to import such articles for their own use, but requires that the introduction of such imported articles, at least so far as the possession of the importer is concerned, should not be prohibited or restricted or burdened, where such prohibition, restriction or burden is not justified by considerations pertaining to the health, morals and safety of the people of the State. The prohibition of possession, practically destroying trade in an imported article of commerce, cannot be sustained unless it can be seen that the Legislature had fair grounds for holding the opinion that the article itself, by reason of its condition or its use, would prove injurious to its citizens; otherwise, on the claim of public policy, based upon the supposed importance of protecting the interests of labor, or of fostering particular industries, or of preserving various products of the State, the Legislature would be entitled most effect ively to regulate and control foreign commerce by destroying or burdening trade in imported articles concededly wholesome and useful. The citizens of the State have the right under the Constitution to the freedom of foreign commerce, and the unhampered trade in imported commodities which are in every way suitable for commerce and admittedly innoxious, and which the Government of the United States has permitted and allowed to be imported through its Custom House.

Even if we admit the contention of our opponents that the Lacey Act applies to shipments of game from European countries, still it will be seen that under the fifth section of the act that such game is only "subject to the operation and effect of the laws of such State or territory *enacted in the exercise of*

its police powers." Consequently the ultimate question remains: Is it within the police power of the State to prohibit the introduction within the State of a wholesome article of food merely from the difficulty the State encounters in enforcing a law to prevent the taking of its game out of season?

We think that this question has been answered fairly and squarely by this Court in the case of *Schollenberger* vs. *Pennsylvania, 171 U. S., 1,* decided May 23, 1898. Judge Peckham, writing for the Court, at page 12 says:

> "The general rule to be deduced from the decisions of this Court is that a lawful article of commerce cannot be wholly excluded from importation into a state from another state where it was manufactured or grown. *A state has power to regulate the introduction of any article, including a food product, so as to insure purity of the article imported, but such police power does not include the total exclusion even of an article of food.*"

And, further, at page 14 he says:

> " We do not think the fact that the article is subject to be adulterated by dishonest persons, in the course of its manufacture, with other substances, which it is claimed may in some instances become deleterious to health, creates the right in any state, through its Legislature, to forbid the introduction of the unadulterated article into the state. The fact that the article is liable to adulteration in the course of manufacture, and that the articles with which it may be mixed may possibly, and under some circumstances, be deleterious to the health of those who consume it, is known to us by means of various references to the subject in books and encyclopedias, but there was no affirmative evidence on the trial to prove the fact. From these sources of information it may be admitted that oleomargarine in the course of its manufacture may sometimes be adulterated by dishonest manufacturers with articles that possibly may become injurious to health. Conceding the

fact, we yet deny the right of a state to absolutely prohibit the introduction within its borders of an article of commerce which is not adulterated and which in its pure state is healthful, simply because such an article in the course of its manufacture may be adulterated by dishonest manufacturers for the purpose of fraud or illegal gains. A bad article may be prohibited, but not the pure and healthy one.

In the execution of its police powers, we admit the right of the state to enact such legislation as it may deem proper, even in regard to articles of interstate commerce, for the purpose of preventing fraud or deception in the sale of any commodity and to the extent that it may be fairly necessary to prevent the introduction or sale of an adulterated article within the limits of the state. But in carrying out its purpose the state cannot absolutely prohibit the introduction within the state of an article of commerce like pure oleomargarine."

And, further, at page 15, he says:

"The fact that it may be adulterated does not afford a foundation to absolutely prohibit its introduction into the state. And although the adulterated article may possibly in some cases be injurious to the health of the public, yet that does not furnish a justification for an absolute prohibition. A law which does thus prohibit the introduction of an article like oleomargine within the State is not a law which regulates or restricts the sale of articles deemed injurious to the health of the community, but is one which prevents the introduction of a perfectly healthful commodity merely for the purpose of in that way more easily preventing an adulterated and possibly an injurious article from being introduced. We do not think that this is a fair exercise of legislative discretion when applied to the article in question."

Following the reasoning of the eminent authority just quoted, it would certainly seem that in the

case at bar it was not a fair exercise of the legislative discretion to exclude a sound and wholesome article of food merely for the purpose of in that way more easily preventing the taking of the native birds out of season; more especially since, from the admitted facts in the case, there is no danger of such imported birds being mistaken for any bird native to this State.

It is admitted by everyone that has any knowledge of the characteristics of the game raised in Europe and that native to the State of New York, that there is no danger of confusing one with the other, even though the birds belong to the same general family. The imported birds can be recognized at a glance. Every dealer that deals in these birds, every butcher who retails them to the householder, and every chef that cooks them, can readily tell the difference between the imported and domestic birds. If this is so, there would be no difficulty on the part of the State to employ game wardens who would be able to distinguish the foreign from the domestic birds. Indeed, in the cases which we have tried before a jury on this same game law, game wardens that were placed on the stand by the State admitted that they could readily recognize the imported from the domestic birds. But, even if this were not so and if the imported birds were the same as the domestic birds, still, we hold, that the State Legislature has no right under the Constitution to exclude the importation of such birds merely from the danger of confusion with the birds of this State, because no such confusion could exist if a proper inspection law was passed, by which the birds imported from foreign countries could be properly tagged and identified. No one who had taken native game during the close season could evade the law by claiming that the birds which he possessed were foreign. He could be made to show his invoices and the burden would always be upon him to establish the defense that the game possessed by him was imported and not native game.

In the case of *Minnesota* v. *Barber*, *136 U. S.*, *313*, decided May 19, 1890, it was held that an inspection relating to an article of food was not a rightful exercise of the police power of the State if the inspection prescribed were of such a character or if it were burdened with such conditions as would wholly prevent the introduction of the sound article from other states. This was held, in relation to the slaughter of animals whose meat was to be sold as food in the State, passing the so-called inspection law. In the case it was earnestly contended by the attorney for the State of Minnesota that inspection of the animals on the hoof before slaughter was absolutely necessary and essential to prevent the sale of diseased meat, and that the statute was enacted by the State in the exercise of its police power. Judge Harlan, writing the opinion of the Court, said at page 319:

> "The presumption that this statute was enacted in good faith for the purpose expressed in the title, namely, to protect the health of the people of Minnesota, cannot control the final determination of the question whether it is not repugnant to the Constitution of the United States. There may be no purpose on the part of the legislature to violate the provisions of that instrument, and yet, a statute enacted by it, under the forms of law, may, by its necessary operation, be destructive of the rights granted or secured by the Constitution. In such cases the Courts must sustain the supreme law of the land by declaring the statute unconstitutional and void."

And at page 320, he said:

> "Underlying the entire argument in behalf of the State is the proposition that it is impossible to tell by an inspection of fresh beef, mutton, lamb or pork, designed for human food, whether or not it came from animals that were diseased when slaughtered; that inspection on the hoof, within a very short

time before animals are slaughtered, is the only mode by which their condition can be ascertained with certainty, and it is insisted with great confidence that of this fact the Court must take judicial notice. If the fact alleged to exist, and upon which the rights of parties depend, is within common experience and knowledge, it is one of which the Courts will take judicial notice. *Brown* v. *Piper*, *91 U. S.*, *37*, *42*; *Phillips* v. *Detroit*, *111 U. S.*, *604*, *606*. But we cannot assent to the suggestion that the fact alleged in this case to exist is of that class. It may be the opinion of some that the presence of disease in animals, at the time of their being slaughtered, cannot be determined by inspection of the meat taken from them; but we are not aware that such is the view universally, or even generally, entertained, but, if, as alleged, the inspection of fresh beef, veal, mutton, lamb or pork, will not necessarily show whether the animal from which it was taken was diseased when slaughtered, it would not follow that a statute like the one before us is within the constitutional power of the State to enact. On the contrary, the enactment of a similar statute by each one of the states composing the union would result in the destruction of commerce among the several states, so far as such commerce is involved in the transportation from one part of the country to another of animal meats designed for human food and entirely free from disease."

And at page 328, he said:

"But a law providing for the inspection of animals whose meats are designed for human food cannot be regarded as a rightful exercise of the police power of the State if the inspection prescribed is of such a character, or is burdened with such conditions, as will prevent altogether the introduction into the State of sound meats, the product of animals slaughtered in other states. It is one thing for a state to exclude from its limits cattle, sheep or swine actually diseased, or meats that, by

> reason of their condition, or the condition of the animals from which they are taken, are unfit for human food, and punish sales of such animals or of such meats within its limits. It is quite a different thing for a state to declare, as does Minnesota by the necessary operation of its statute, that fresh beef, veal, mutton, lamb or pork—articles that are used in every part of this country to support human life—shall not be sold at all for human food within its limits unless the animal from which such meats are taken is inspected in that state, or, as is practically said, unless the animal is slaughtered in that state."

This principle was followed in the case of *Brimmer* v. *Redman*, *138 U. S.*, *78*, and in *Scott* v. *Donald*, *165 U. S.*, *58*. To the same effect see also *Railroad Co.* v. *Husen*, *95 U. S.*, *465*.

The fact that, in the cases just discussed, there had been no act passed by Congress similar to the "Wilson" or "Lacey Acts" would not distinguish those cases from the case at bar. For in all those cases the Court specifically held that *it was not within the police power of the State* to pass a statute wholly excluding a pure, wholesome and inherently harmless article of food, merely from the danger of confusing such an article with an adulterated, harmful article or from the difficulty of enforcing its inspection laws.

Consequently, if such statutes are *not within the police power of the State*, they would in no way be aided by acts such as the "Wilson" or "Lacey Acts," which provide that liquor and game shall, upon arrival within the State, be "subject to the laws of such State or Territory *enacted in the exercise of its police powers.*"

By the "Lacey Act" Congress did not provide that imported foreign dead game birds should not be possessed or sold within the State of New York. It did not and could not exercise any police power on behalf of the State. In providing that such prop-

erty should be subject to the police power of the State upon arrival, although in original packages, Congress did not *enlarge* the police power of the State, but simply removed an obstacle to its exercise, which otherwise would exist by virtue of the fact that the article remained in the original package unsold.

Congress did not, and could not, delegate to the State the right to regulate foreign commerce or to exclude from the State a sound and wholesome article of food, the importation of which Congress had specifically allowed.

It follows, therefore, that the provisions of the Forest, Fish and Game Law of the State of New York, in so far as they prohibit the possession by an importer of a pure and wholesome article of food, such as were the imported game birds in the case at bar, are unconstitutional in that they unjustifiably restrict foreign commerce, and that such legislation cannot be justified under the provisions of the "Lacey Act" or under any course of reasoning that would tend to place noxious, intoxicating liquors in the same category with pure, wholesome and inherently harmless game.

POINT VI.

On all of the several grounds above discussed we submit that the judgment below should be reversed.

EDWARD R. FINCH,
JOHN BURLINSON COLEMAN,
Of Counsel for Plaintiff-in-Error.

APPENDIX.

The Lacey Act, 31 U. S. Stat. at Large, Chap. 553.

AN ACT to enlarge the powers of the department of agriculture, prohibit the transportation by interstate commerce of game killed in violation of local laws, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the duties and powers of the department of agriculture are hereby enlarged so as to include the preservation, distribution, introduction, and restoration of game birds and other wild birds. The secretary of agriculture is hereby authorized to adopt such measures as may be necessary to carry out the purposes of this act and to purchase such game birds and other wild birds as may be required therefor, subject, however, to the laws of the various states and territories. The object and purpose of this act is to aid in the restoration of such birds in those parts of the United States adapted thereto where the same have become scarce or extinct, and also to regulate the introduction of American or foreign birds or animals in localities where they have not heretofore existed.

The secretary of agriculture shall from time to time collect and publish useful information as to the propagation, uses, and preservation of such birds. And the secretary of agriculture shall make and publish all needful rules and regulations for carrying out the purposes of this act, and shall expend for said purposes such sums as Congress may appropriate therefor.

Section 2. That it shall be unlawful for any person or persons to import into the United States any foreign wild animal or bird except under special permit from the United States department of agri-

culture; Provided, That nothing in this section shall restrict the importation of natural history specimens for museums or scientific collections, or the importation of certain cage birds, such as domesticated canaries, parrots, or such other species as the secretary of agriculture may designate.

The importation of the mongoose, the so-called "flying foxes" or fruit bats, the English sparrow, the starling or such other birds or animals as the secretary of agriculture may from time to time declare injurious to the interest of agriculture or horticulture is hereby prohibited, and such species upon arrival at any of the ports of the United States shall be destroyed or returned at the expense of the owner. The secretary of the treasury is hereby authorized to make regulations for carrying into effect the provisions of this section.

SECTION 3. That it shall be unlawful for any person or persons to deliver to any common carrier, or for any common carrier to transport from one state or territory to another state or territory, or from the District of Columbia or Alaska to any state or territory, or from any state or territory to the District of Columbia or Alaska, any foreign animals or birds the importation of which is prohibited, or the dead bodies or parts thereof of any wild animals or birds, where such animals or birds have been killed in violation of the laws of the state, territory, or district in which the same were killed: Provided, That nothing herein shall prevent the transportation of any dead birds or animals killed during the season when the same may be lawfully captured, and the export of which is not prohibited by law in the state, territory, or district in which the same are killed.

SECTION 4. That all packages containing such dead animals, birds or parts thereof, when shipped by interstate commerce, as provided in section one of this act, shall be plainly and clearly marked, so

that the name and address of the shipper and the nature of the contents may be readily ascertained on inspection of the outside of such packages. For each evasion or violation of this act the shipper shall, upon conviction, pay a fine of not exceeding two hundred dollars; and the consignee knowingly receiving such article so shipped and transported in violation of this act shall, upon conviction, pay a fine of not exceeding two hundred dollars; and the carrier knowingly carrying or transporting the same shall, upon conviction, pay a fine of not exceeding two hundred dollars.

SECTION 5. That all dead bodies or parts thereof of any foreign game animals, or game or song birds, the importation of which is prohibited or the dead bodies, or parts thereof, of any wild game animals, or game or song birds transported into any state or territory, or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such state or territory be subject to the operation and effect of the laws of such state or territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such animals and birds had been produced in such state or territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise. This act shall not prevent the importation, transportation, or sale of birds or bird plumage manufactured from the feathers of barnyard fowl.

Approved, May 25, 1900.

[258625]

Office Supreme Court, U. S.
FILED.
OCT 13 1908
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States.

No. 502—OCTOBER TERM, 1907.
No. 206—OCTOBER TERM, 1908.

THE PEOPLE OF THE STATE OF NEW YORK
EX REL. AUGUST SILZ,
Plaintiff-in-Error,

against

HENRY HESTERBERG, SHERIFF OF THE COUNTY OF KINGS,
Defendant-in-Error.

BRIEF OF THE ATTORNEY-GENERAL OF THE STATE OF NEW YORK IN BEHALF OF THE DEFENDANT-IN-ERROR.

WILLIAM SCHUYLER JACKSON,
Attorney-General of the State of New York.

JAMES A. DONNELLY,
Deputy Attorney-General,
Of Counsel.

NEW YORK:
MARTIN B. BROWN CO., PRINTERS AND STATIONERS,
NOS. 49 TO 57 PARK PLACE.
1908.

(19097B)

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Supreme Court of the United States.

THE PEOPLE OF THE STATE OF NEW YORK *ex rel.* AUGUST SILZ, Plaintiff in Error, *against* HENRY HESTERBERG, Sheriff of the County of Kings, Defendant in Error.	No. 206, October Term, 1908.

Statement.

This cause comes before this Court on a writ of error to the Court of Appeals of the State of New York, and the writ brings up for review certain errors of law alleged to have been committed by said Court in directing the entry in the office of the Clerk of the County of Kings, in the State of New York, of the final order therein on the 27th day of July, 1906, which said final order quashed and dismissed the writ of *habeas corpus* issued herein on the 7th day of April, 1905, and remanded the relator to the custody of the Sheriff of said county.

The relator, a dealer in foreign game, was arrested for unlawfully having in his possession on the 30th day of March, 1905, in the Borough of Brooklyn, City of New York, and County of Kings, one dead body of a bird known as "golden plover" and one dead body of a bird known as "grouse," which were imported from England and Russia, respectively, and brought within

the State of New York and County of Kings, and then and there possessed in violation of the Forest, Fish and Game Laws of the State of New York.

In May, 1900, Congress passed the law known as the Lacey Act, providing:

> "That all dead bodies or parts thereof, of any foreign game animals, or game or song birds, the importation of which is prohibited, or the dead bodies or parts thereof, of any wild game animals, or game or song birds transported into any state or territory, or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such state or territory be subject to the operation and effect of the laws of such state or territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such animals or birds had been produced in such state or territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise" (31 U. S. Stat. at Large, C. 553, sec. 5).

Section 108 of the Forest, Fish and Game Laws of the State of New York (as amended by sec. 2, chap. 588, Laws of 1904) provides that plover shall not be possessed in the County of Kings from January 1 to July 15, both inclusive, and by section 106 of the Forest, Fish and Game Law the possession of grouse in said county from January 1 to July 30 is also prohibited.

By section 101 of the Forest, Fish and Game Law, whenever the possession of fish and game, or the flesh of any animal, bird or fish, is prohibited by the Game Law reference is had equally to such fish, game or flesh coming from without the State as to that taken within the State.

A person who violates the provisions of sections 106 and 108 of the Game Law is guilty of a misdemeanor

and liable to the additional penalties prescribed by law (sec. 119 of the Forest, Fish and Game Law).

The questions presented for this Court's determination by the relator's assignment of so-called errors may be summarized as follows:

(1) Are the provisions of the Lacey Act sufficiently broad to confer upon the State of New York the power to prohibit during its close season the possession of game birds imported from other States and from foreign countries?

(2) If the act may be so construed, is it within the power of Congress to authorize the States to enact such laws for the protection of their native game?

(3) Are not the provisions of the New York Forest, Fish and Game Laws unconstitutional, null and void in that:

(a) They operate to deprive persons of their liberty and property without due process of law? and

(b) In that they constitute an unjustifiable interference with and regulation of Interstate and Foreign Commerce?

The contention that the provisions of the New York Forest, Fish and Game Laws deprive a person of his liberty and property without due process of law and that they unwarrantably and unjustifiably restrict Interstate and Foreign Commerce seems to us to be based upon an erroneous conception of the nature of the property in game birds which may be the subject of individual ownership. From time immemorial it has been held that when property in game birds may be acquired by the individual is so peculiarly a matter of State regulation that we must look to local laws not only for the definition of what constitutes game, but of the times when and the con-

ditions under which property in it may be acquired. The protection of game naturally falls within the legitimate exercise by the State of its police power; and if in the exercise of such authority the State, for the purpose of protecting its native game, prohibits during certain seasons the possession of game imported from another State or from a foreign country, such legislation will be sustained even though Interstate or Foreign Commerce may be indirectly affected thereby. In any event, the question of whether or not the New York Legislature had the right to prohibit the possession, during its close season, of game birds imported from another State or from foreign countries appears to be settled by the provisions of the Act of Congress known as the Lacey Act.

The relator sought discharge from arrest by a Writ of *Habeas Corpus*. When the argument on the writ and the return thereto was had before Mr. Justic Maddox at the Kings County Special Term of the New York Supreme Court, he requested that the Attorney General appear in view of the importance of the question and of the fact that the Attorney General was defending the statute in other litigations. The Attorney General did appear; and, as the questions presented by relator's writ of error involve the constitutionality of statutes enacted by the New York State Legislature, he submits this brief in addition to such memorandum or brief as may be submitted by the learned District Attorney of Kings County.

POINTS.

I.

Congress has power to authorize any of the States to subject game birds imported from another State or from foreign countries to the operation of local laws.

Upon this proposition there does not appear to be much necessity for extended discussion in view of the decision of this Court in the Matter of Rahrer, 140 U. S., 545; Rhodes *vs.* Iowa, 170 U. S., 412; and Vance *vs.* N. A. V. Co. No. 1, 170 U. S., 438.

The cases cited arose upon the construction of an act of Congress approved August 8, 1890, known as the Wilson Act entitled, "An act to limit the effect of the regulation of commerce between the several States and with foreign countries in certain cases." It reads in part as follows:

> "That all fermented, distilled or other intoxicating liquors or liquids transported into any state or territory, or remaining therein for use, consumption, sale or storage therein, shall, upon arrival in such state or territory, be subject to the operation and effect of the laws of such state or territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such state or territory, and shall not be exempt therefrom by reason of not being introduced therein in original packages or otherwise. (26 Stat. at L. 313, Chap. 728)."

It will be seen that the language of the Wilson Act is almost precisely similar in terms to that of the Lacey Act, the only difference being that the latter relates to

game and the former to intoxicating liquors. While the validity and effect of the Lacey Act have not been passed upon by this Court, the Court of Appeals held in the case at bar that Congress can, in view of the decision in the Matter of Rahrer (*supra*), authorize an exercise of the police power by a State which without such authority would be an unconstitutional interference with commerce.

In the Matter of Rahrer (140 U. S., 545), this Court held that the Wilson Act is constitutional and that after it took effect liquors imported into a State were subject, both as to possession and sale, to the existing laws of that State.

The question in that case arose upon a Writ of *Habeas Corpus*.

Rahrer was arrested for selling in the State of Kansas liquors that had been imported from the State of Missouri on the 9th day of August, 1890.

The statute claimed to have been violated by Rahrer was as follows:

> "Any person or persons who shall manufacture, sell or barter any spirituous, malt, vinous, fermented or other intoxicating liquors shall be guilty of a misdemeanor and punished as hereinafter provided: Provided, however, that such liquors may be sold for medical, scientific and mechanical purposes, as provided in this act * * *."
>
> 1 Gen. Stat. Kan., ch. 31, secs. 380, 381 and 386.

Mr. Chief Justice Fuller, in delivering the opinion of the Court, said, among other things, as follows:

> "The power of the State to impose restraints and burdens upon persons and property in conservation and promotion of the public health, good order and

prosperity, is a power originally and always belonging to the states, not surrendered by them to the general government nor directly restrained by the Constitution of the United States and essentially exclusive.

"And this Court has uniformly recognized State legislation, legitimately for police purposes, as not in the sense of the Constitution necessarily infringing upon any right which has been confided expressly or by implication to the national government. * * * In short, it is not to be doubted that the power to make the ordinary regulations of police remains with the individual States, and cannot be assumed by the national government, and that in this respect it is not interfered with by the Fourteenth Amendment. (Barbier *vs.* Connolly, 113 U. S., 27, 31.) * * * In the case at bar, petitioner was arrested by the State authorities for selling imported liquor on the 9th of August, 1890, contrary to the laws of the State. The act of Congress had gone into effect on the 8th of August, 1890, providing that imported liquors should be subject to the operation and effect of the State laws to the same extent and in the same manner as though the liquors had been produced in the State; and the laws of Kansas forbade the sale. * * * Congress did not use terms of permission to the State to act, but simply removed an impediment to the enforcement of the State laws in respect to imported packages in their original condition, created by the absence of a specific utterance on its part. It imparted no power to the State not then possessed, *but allowed imported property to fall at once upon arrival within the local jurisdiction.* * * * This is not the case of a law enacted in the unauthorized exercise of a power exclusively confided to Congress; but of a law which it was competent for the State to pass,

but which could not operate upon articles occupying a certain situation until the passage of the act of Congress.

"That act in terms removed the obstacle, and we perceive no adequate ground for adjudging that a re-enactment of the State law was required before it could have the effect upon imported which it had always had upon domestic property."

In Rhodes *vs.* Iowa (*supra*), the Court said, referring to the Wilson Act:

"It is not gainsaid that the effect of the act was to deprive the receiver of goods shipped from another State of all power to sell the same in the State of Iowa in violation of its laws. * * * It has been settled that the effect of the act of Congress is to allow the statutes of the several States to operate upon packages of imported liquor before sale."

In Vance *vs.* N. A. V. Co., No. I., 170 U. S., 438, it was held that under the Wilson Act intoxicating liquors transported from one State to another became—as soon as the act of transportation was complete—subject to the laws of the State into which they were brought.

In the Matter of Rahrer the constitutional power of Congress to pass the enactment in question was upheld and the purpose of Congress in adopting it was declared to have been to allow state laws to operate on liquor shipped into one state from another so as to prevent the sale in the original package in violation of state laws.

In Rhodes *vs.* Iowa, the same view was taken of the statute; and, although it was decided that the power of the state did not attach to the intoxicating liquors when in course of transit and until receipted and delivered, it was nevertheless reiterated that the obvious and plain meaning of the act of Congress was to allow the state laws to attach to intoxicating liquors received by inter-

state commerce shipments before sale in the original package, and therefore at such a time as to prevent such sale if made unlawful by the State law. And in Rhodes *vs.* Iowa, it was also held that the power to regulate the right of sale may be delegated by Congress to the States.

In re Spickler, 43 Fed. Rep., 653, it was held that the Act of Congress known as the "Wilson Bill," which declares that intoxicating liquors shall, on arrival in a State, be subject to the operation of the police powers of the State, simply defines the time when imported intoxicating liquors shall become subject to State control; and is therefore not unconstitutional as being a delegation to the States of the power to regulate interstate commerce.

In re Van Vliet, 43 Fed. Rep., 761, it was held that the Act of Congress known as the "Wilson Bill," making intoxicating liquors imported in original packages subject to the laws of any State into which they are carried is not an unlawful delegation of power, as it simply declares when such property shall become subject to State laws.

In State *ex rel.* George F. Aiken, 42 s. c., 222, it was held that the sale as well as the conditions upon which intoxicating liquors shall be sold after entering the territorial limits of a State is left to State legislation by the Act of Congress known as the "Wilson Act."

To the same effect, see—

In re Bergen, 115 Fed. Rep., 339.
State *vs.* Bixman, 162 Mo., 1.
Starace *vs.* Rossi, 69 Vt., 303.
State *vs.* Intoxicating Liquors, 95 Me., 140.

II.

The provisions of the Lacey Act relate to birds imported from other States or from foreign countries, and birds imported into New York State from a foreign country are subject upon arrival to the police laws of the State.

In the New York Courts, relator's contention was that, correctly interpreted, the provisions of the Lacey Act relate only to foreign game birds, "the importation of which is prohibited" by the act; that the word "transportation" used in the statute, means "shipped from one State to another," and that, therefore, game birds, the importation of which is not prohibited by the act are by necessary implication excluded from State control.

The provisions of the Lacey Act, in so far as they are alleged to be in conflict with the commerce clause of the Federal Constitution, have been, with one exception, construed by the New York courts in several cases to apply to game birds imported from foreign countries. The exception to which we refer may be found in the prevailing opinion delivered by Mr. Justice Woodward upon the appeal by the relator to the New York Supreme Court, Appellate Division, Second Department, from the order entered at Special Term, quashing the writ of *habeas corpus* (People *ex rel.* Silz *vs.* Hesterberg, 109 App. Div., 295). In that case, however, the learned justice stated that he reached his conclusion without making a careful analysis of the statute and based it upon the assumption that the Court was dealing with a conceded article of foreign commerce, the importation of which is not prohibited. The assumption that the birds in question are "conceded articles of foreign com-

merce" seems to us, in view of the decisions cited in Point III. of this brief to be erroneous. Upon this branch of the subject, Mr. Justice Miller, who wrote a dissenting opinion, reached a different conclusion. After quoting a number of authorities, including those cited in Point III. of this brief and some others, he said:

> "Having settled the question that the subject is a proper one for the exercise of the police power, the conclusion would seem to be inevitable that the necessity for the exercise of such power and the means of making such exercise effective are solely for the Legislature, and that in selecting means legitimately tending to accomplish its purpose the Legislature does not offend either the State or Federal Constitution. No one disputes the right of the State to legislate respecting purely internal affairs, and so far as the commerce clause of the Federal Constitution is concerned, this right does not rest upon the police power; it is only when the legislation affects interstate or foreign commerce that it must be sustained, if at all, by resort to the police power reserved to the States. No one disputes that the individual holds his property subject to the legitimate exercise of the police power, and in this case it may be added that the petitioner acquired the property with the knowledge, with which he was at least chargeable, of the circumstances under which he could possess it. Concededly the subject of this legislation was a proper one for the exercise of the police power, the means adopted certainly tend to accomplish the object in view, and we cannot say that the object of the statute has been lost sight of or that the act in its essentials is anything but an act passed in the exercise of the police power to preserve the game of the State; and the fact that commerce may be remotely affected or that the dominion of an individual over his property may

be controlled does not bring the act within the prohibition of either the State or Federal Constitution, unless while asserting the power we are to deny the right to exercise it effectively."

The construction to be placed upon the provisions of the Lacey Act likewise received the careful attention of Mr. Justice Miller:

"Certainly the expression 'any wild game animals, or game or song birds,' includes foreign animals or birds, and there is no force in the argument based on the use of the word 'transported,' because that is not a correlative of the word 'importation'; it relates alike to the phrase 'all dead bodies or parts thereof of any foreign game animals,' etc., and obviously means 'carried,' which is comprehensive enough to include both an import and a shipment from one State to another. The office of construction is to determine the legislative intent, and when such intent is apparent, canons of construction, adopted solely to determine what it is, must yield to it. Congress declared in the first section of the act that its purpose was to aid in the preservation, distribution, introduction and restoration of game and other wild birds, and the manner in which it effected this purpose was by supplementing State laws to the extent of removing any question as to their conflict with the commerce clause of the Federal Constitution. It evidently deemed the act an appropriate one by which to prohibit the importation of animals and birds deemed to be injurious to agriculture and horticulture. Our attention is not called to any other Federal statute prohibiting the importation of game animals, or birds, and if the application of section 5 is to be limited to the foreign animals and birds, the importation of which is prohibited by the act, we shall have difficulty in determining what harm the Congress

thought dead mongoose, bats, sparrows and starling might inflict upon agriculture or horticulture, or exactly what aid in the enforcement of local laws would result from making their 'dead bodies or parts thereof' subject to the operation and effect of said laws. The construction contended for would entirely defeat the declared purpose of the act. Obviously the sole purpose of making game taken without the State subject to the laws of the State is to prevent the sale of game taken within the State under the guise of game taken from without, and if foreign game can be utilized for the purpose, it would be senseless as well as useless to prohibit game from other States. As the expression 'any wild game animals, or game or song birds transported into any state or territory,' includes foreign game, and as that construction gives effect to the declared purpose of the act, while any other defeats such purpose, such construction should be adopted, whatever other parts of the act may be thought to mean."

In the Court of Appeals Mr. Chief Justice Cullen's interpretation of the Lacey Act was concurred in by all his associates. There was no doubt in the Court's view that Congress by the enactment of the Lacey Act conferred upon the State of New York the power to protect its native game by prohibiting during the close season the possession of the bodies or flesh of game birds, whether the same be taken within the State or imported from foreign countries. The only question, in the Court's opinion, was the interpretation of the Lacey Act, and the argument of relator's counsel that its provisions applied solely to interstate shipments and not to importations from foreign countries was answered as follows:

"The act is entitled: 'An Act to enlarge the powers of the Department of Agriculture, prohibit the transportation by interstate commerce of game

killed in violation of local laws, and for other purposes.' The first section relates to the Department of Agriculture; the second prohibits the importation of any foreign wild animal or bird except under special permit from that department, providing that it shall not restrict the importation of natural history specimens nor caged birds, such as domesticated canaries, parrots and the like. It then forbids absolutely the importation of the mongoose, flying foxes, the English sparrow and such other birds as the Secretary of Agriculture may deem injurious to the interest of agriculture or horticulture. The third section forbids the delivery to a common carrier for shipment from one State to another of any wild animals or birds killed in the State in violation of its laws. The fifth section deals with the transportation into any State of animals killed without the State. It is as follows: 'That all dead bodies or parts thereof, of any foreign game animals, or game or song birds, the importation of which is prohibited, or the dead bodies or parts thereof, of any wild animals, or game or song birds transported into any State or territory, or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such State or territory be subject to the operation and effect of the laws of such State or territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such animals or birds had been produced in such State or territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise. This act shall not prevent the importation, transportation or sale of birds or bird plumage, manufactured from the feathers of barnyard fowl.' It is contended that the title of the statute tends to show that the operation of section 5 is confined to shipment from other

States and not to importation from foreign countries. If the title of an act could limit its effect, which it cannot (Potter's Dwarris on Statutes, p. 102), still this claim is without foundation. The first two sections of the act deal with the Department of Agriculture, and the reference thereto in the title is appropriate. The third and fourth sections deal with interstate transportation of game killed in violation of local laws, and the reference in the title 'prohibit the transportation by interstate commerce of game killed in violation of local laws' is equally appropriate. The fifth section, which is the one before us, deals with an entirely different matter, transportation into a State, not out of a State, and is embraced in the title of the statute only under the designation 'and for other purposes.' As to this subject, therefore, the title in no respect tends to limit the effect of the act. It is difficult to see any reason why Congress should have sought to discriminate between the bodies of game, song birds or wild animals brought into a State from other States and those brought from foreign countries. The object of the legislation was to enable the States by their local law to exercise a power over the subject of the preservation of game and song birds, which without that legislation they could not exert. Every consideration that led Congress to think it wise to confer on the State of New York, as well as on other States, power (which is practically that of prohibition during the close season, at least for the purposes of sale) over the importation of partridges from New Jersey, Pennsylvania or Connecticut, is equally applicable to the importation of such birds from Canada. The obstacle to the successful enforcement of the game laws of the State would be as great in the one case as the other, and as Canada borders on the United States for a distance of three thousand miles the

practical danger would be as great in one case as in the other, whatever it might be in the case of an importation from Europe" (People *ex rel.* Hill *vs.* Hesterberg, 184 N. Y., at p. 132).

III.

State laws enacted for the protection of game do not deprive any person of his liberty or property without due process of law and do not unlawfully or unjustifiably restrict interstate or foreign commerce.

Before discussing this proposition we desire to direct attention to the allegations set forth in relator's Fifth and Sixth assignments of error. They may be justly characterized, we think, as an ingenious but unconvincing suggestion that the birds in relator's possession were not the kind and variety of birds the possession of which was intended to be prohibited by the New York Forest, Fish and Game Law. Upon this assumption, of course, relator's possession of them during the close season in New York did not justify his arrest upon the charge of having violated the game law of that State. Upon this branch of the subject, Mr. Chief Justice Cullen, who wrote the opinion of the Court of Appeals in which all the other judges concurred, said:

> "Substantially all the questions raised by the affidavit (*i. e.*, the affidavit upon which the warrant for the arrest of Silz was issued), save one, are disposed of by the views we have already expressed. The exception is the statement in the affidavit 'that said imported golden plover and imported grouse are different varieties of game birds from the game birds known as plover and grouse in the State of New York and from any birds native to America. They are different in form, shape, size, color and marking from the game birds known as plover and grouse in the State of New York.' Of course, if the birds, the possession of which is charged against the relator,

are not grouse or birds of the grouse family, then no crime is stated in the affidavit and the relator should be discharged. But in view of the express allegation at the commencement of the affidavit that the defendant was possessed of one imported grouse, we are inclined to the view that the statement quoted should be construed as meaning not that the bird so possessed was not a grouse, but that it was a different variety of grouse from that which is native to the State of New York. So construed this fact constitutes no defense nor does the allegation that they are different in form, shape and color from native birds. It was for the Legislature to determine, in the protection of native game, how far it was necessary or wise to include within the penal provisions of the statute birds of the same family and of a similar character, though differing in some respects. Of course, this statement is made within limits. To protect pigeons, turkeys could not be excluded. In the present case, however, we are clear that the Legislature has acted within its power."

See 184 N. Y., at pages 135-136.

In the case at bar we are not dealing with property which is the subject of ordinary commerce. When property in game birds may be acquired is so peculiarly a matter of State regulation that its possession is governed by rules entirely different from those which apply to general articles of merchandise. From every early times, the property which the individual may acquire in wild animals or game of any description has been qualified by the superior right of the State to restrict its use and possession. The question of individual ownership has always been one of public policy and not of private right. Thus in the feudal as well as the ancient law of the continent of Europe, in all countries the right to acquire animals *ferae naturae* by possession was recognized as being subject to the governmental authority and

under its power, not only as a matter of regulation but also by absolute control (Geer *vs.* Connecticut, 161 U. S., 523). In England, the ownership of game is vested in the sovereign power and the right to take certain game may not only be restricted to a particular class of animals or birds but may be granted to particular persons only as a license (2 Black. Comm., 394, 410; Magner *vs.* People, 97 Ill., 333). In the United States the ownership of game is in the people of the State—the repositary of sovereign authority—and no person *has any private right to be affected.* To hunt and kill game is a privilege granted by the State. The ownership of game is held by the sovereign authority in trust for all the people in the State (Magner *vs.* People, *supra*).

The definition of what constitutes game in any particular locality and the time when property in it may be acquired there, are therefore to be found in the local statutes in force for its protection. In this country, the uniform weight of authority is to the effect that each State has the right to enact such laws for the protection of its game as to it shall seem best for the accomplishment of that purpose, even though in attempting to effect that result the State prohibits its importation.

In People *vs.* Bootman, 180 N. Y., 1, Judge Vann, writing the opinion of the Court of Appeals, in which all his associates concurred, said:

> "For time out of mind and in all jurisdictions, laws passed for the protection of fish and game have been regarded as sanctioned by the police power which belongs to every sovereign State. The game and the fish within the boundaries of the state belong to the people in their unorganized capacity and may be taken by any citizen without fee or license at any time during the open season. It is to the interest of the state that neither should be wasted or destroyed

and that both should be carefully protected, especially during the breeding season. Without protection the fish and game will soon disappear and the people thus be deprived of an important source of food supply, as well as a delightful recreation which promotes health and prolongs life. The protection of game falls within the legitimate exercise of the police power, because it is directly connected with the public welfare, which is promoted by the preservation and injured by the destruction of so useful an article of food, free at the proper time to all the people of the State. Laws passed for this purpose do not interfere with private property, for there is no property in living wild animals and only as the law permits their capture is there property in wild animals after they are caught or killed.

"The right to pass laws for the protection of game being conceded, as in view of the authorities it must be, the method of affording protection is necessarily within the discretion of the legislature. It may provide a close season for the taking of game, and may prohibit the possession or sale of game during that season. It may close the game market throughout the state during the period of prohibition, in order to remove temptation from poachers and pot-hunters, who are not apt to run the risk of taking game out of season if they cannot sell it. To do this effectively it may be necessary to close the market as to game taken without the state, as well as within, for there are no marks by which birds killed in Michigan can be distinguished from those killed in New York. When enacting a game law the legislature may provide for its ready enforcement, not simply by making the possession of game during the close season presumptive evidence of a violation of the statute, but it may go farther and, in order to prevent evasion, fraud and perjury, may prohibit

the possession of game in this State during the close season, even if it was taken in another State and brought here during the open season."

In People *vs.* O'Neil, 110 Mich., 324, it was held that a statute prohibiting the sale of fish during the close season is not an unlawful restriction of interstate commerce as applied to game or fish imported from other States as articles of food.

In State *vs.* Randolph, 1 Mo. App., 15, it was held it is not a defense to a prosecution for selling game in violation of a State law forbidding that kind of game to be sold during specified months to show that the game sold was brought from another State. Such a law is not invalid as being a regulation of commerce.

In State of Missouri *vs.* Randolph, *supra,* the Court said:

> "The act in question makes it a penal offense to have prairie chickens in one's possession from February 1 to August 15, in Missouri, no matter where the birds were caught. * * *
>
> "The Game Law would be nugatory if, during the prohibited season, game could be imported from the neighboring States. It would be impossible to show, in most instances, where the game was caught. The State of Missouri has as much right to preserve its game as it has to preserve the health of its citizens, and may prohibit the exhibition for sale, within the State, of provisions out of season, without any violation of the Constitution of the United States. So far as we know this right has never been disputed, and its exercise by the absolute prohibition of the having in possession, or sale, of game within the State limits, during certain periods of the year, is no more an illegal attempt to regulate commerce between the States than would be a city ordinance against selling oysters in July."

The Randolph case, *supra,* was approved in the case of the State *vs.* Judy, 7 Mo. App., 525, where the Court said:

> "It is contended that the act prohibiting the citizens from possessing game which was killed in season cannot be justified by any ground of public policy for the protection of game. But with the existing facilities for keeping and transporting meat by means of refrigerators, an act which should merely prohibit the killing of game within the breeding season would be clearly nugatory. A game law, to be effectual, must go further and make the mere possession of the game during the time that it cannot be lawfully killed a penal offence."

In Stevens *vs.* State, 89 Md., 669 (1899), it was held that the total prohibition of having game, from whatever source derived, in possession during the close season is a reasonable, if not necessary means of protecting the domestic game of the State making the prohibition.

In State *vs.* Schuman, 58 Pac. Rep., 661 (1899), it was held that section 5, page 199, of the Laws of 1899 of Oregon, providing that it shall be unlawful to have in possession at any time any species of trout, applies with as much force to trout lawfully caught in another State and shipped into Oregon as to those caught within its limits.

Section 626 of the California Statutes of 1893 reads as follows:

> "Every person in the State of California who shall at any time sell or offer for sale, the hide or meat of any deer, elk, antelope or mountain sheep shall be guilty of a misdemeanor."

In ex parte Maier, 103 Cal., 479, it was claimed that this provision of the statute properly construed does not prohibit the sale of deer meat lawfully taken without the State, but has reference solely to deer killed within the State.

It was held that the act entirely prohibited traffic in the meat of these game animals within the State, no matter where killed, for the protection of game. The Court said:

> "The facility and ease with which the statutes for the protection of game have been evaded in the past is a matter of common knowledge. Deer and other game have been slaughtered during the close season and foisted upon the market as game procured without the State, and owing to the practical impossibility in the great majority of cases of proving with certainty the source from which it was procured, the attempted enforcement of the statutes for its protection has largely proven abortive. These and like considerations no doubt actuated the Legislature in the premises and induced the enactment of the statute in its present stringent form."

Section 6 of the Game Law of Illinois provides as follows:

> "No person or persons shall sell or expose for sale or have in his or their possession for the purpose of selling or exposing for sale, any of the animals, wild fowl or birds mentioned in section I. of this act after the expiration of five days next succeeding the first day of the period in which it shall be unlawful to kill, trap or ensnare such animals, wild fowls or birds. * * *."

The wild birds mentioned in section I. are pinnated grouse, woodcock, prairie chicken, quail and ruffed grouse, wild goose, duck, brant, etc.

In Magner *vs.* People, 97 Illinois, 331, it was held that as no exception is made in the statute to the place where the birds shall have been taken, the act refers to the prohibition of all possession of the wild birds mentioned.

The Court said:

> "A law which renders *all* sales and *all* possession unlawful will more certainly prevent any possession or any sale of the game within the State than will a law allowing possession or sales here of the game taken in other States. This is but one of many instances to be found in the law where acts which in and of themselves alone are harmless enough are condemned because of the facility they otherwise offer as a cover or disguise for the aiding of that which is harmful. * * *.
>
> "We think it obvious that the prohibition of all possession and sales of such wild fowls or birds during the prohibited seasons would tend to their protection in excluding the opportunity for the evasion of such law by clandestinely taking them, when secretly killed or captured here beyond the State and afterward bringing them into the State for sale, or by other subterfuges and evasions."

In Merritt *vs.* The People, 48 N. E. (Illinois), 325, the Court held that it was manifest that section 6 of chapter 61 of the Revised Statutes of Illinois, 1893, *supra,* was enacted for the purpose of regulating the possession and sale of animals and game birds of any species mentioned in section I. of the act which were taken or killed without the State. The Court said:

> "Section 6 was therefore enacted for the purpose of prohibiting possession or sales of animals and birds taken or killed in a foreign state of such species as the sale thereof was prohibited by section 2 during the period of time when it was unlawful under section I. to take and kill animals and birds of the same species in Illinois."

The English law is based upon principles similar to those enunciated in the foregoing cases. The case of

Whitehead *vs.* Smithers, 2 Com. Pleas. Div., 553, is directly in point. The statutes involved in that case were the following:

> 35 and 36 Vict., c. 78, sec. 2. "Any person who shall knowingly or with intent to kill, wound, or take any wild bird, or shall expose or offer for sale any wild bird recently killed, wounded or taken between the 15th of March and the 1st of August in any year, shall on conviction of any such offense before any justice or justices of the peace in England, etc., for a first offense be reprimanded and discharged on payment of costs and summons and for every subsequent offense forfeit and pay for every such wild bird so killed, wounded or taken or so exposed or offered for sale, such sum of money as, including the costs of conviction, shall not exceed 5s., as to the justice or justices shall seem meet, unless he shall prove to the satisfaction of the justice, that the said wild bird was bought or received on or before the said 15th of March, or of or from some person or persons residing out of the United Kingdom."

Act. 39 and 40 Vict., c. 29, cites that the wild fowl of the United Kingdom forming a staple article of food and commerce have of late years greatly decreased in number by reason of their being inconsiderately slaughtered during the time they have eggs and young, and that owing to their marketable value the protection accorded to them by 35 and 36 Vict., c. 78, is insufficient. By section 2:

> "Any person who shall kill, wound or attempt to kill, or wound, or take any wild fowl, or use any boat, gun, net or other engine or instrument for the purpose of killing, wounding or taking any wild fowl, or shall have in his control or possession any wild fowl recently killed, wounded, or taken, between the 15th of February and the 10th of July

> in any year shall on conviction of any such offense before any justice or justices of the peace in England, etc., forfeit and pay for every such wild fowl, so killed, wounded or taken, or so in his possession not exceeding 1£, with the costs of conviction."

In the Smithers case it was proved that the plover, with the possession of which the defendant was charged, was one of a consignment of dead plovers received from Holland. It was contended by the defendant that the plover in question, being a foreign wild bird and killed abroad, the case did not come within the Act of 1876.

The Court held that it was no defense to an information under this statute for exposing wild birds for sale during the prohibited season that such birds have been bought or received of or from a person residing out of the United Kingdom. Lord Coleridge, in delivering the opinion, said:

> "It is said it would be a strong thing for the legislature of the United Kingdom to interfere with the rights of foreigners to kill foreign birds. But it may well be that the true and only mode of protecting British wild fowl from indiscriminate slaughter, as well as of protecting other British interests, is by interfering indirectly with the proceedings of foreign persons. The object is to prevent British wild fowl from being improperly killed and sold under pretense of their being imported from abroad."

In the State of New York legislation of a similar character was upheld years before the passage by Congress of the act known as the Lacey Act. Thus in Phelps *vs.* Racey, 60 N. Y., 10, it was held that the Act of 1871 "for the preservation of game" (secs. 7, 8, 33, chap. 721, Laws of 1871) prohibits the having in possession game birds, of the kinds specified, after the first of

March, although killed at a time when, by the act, the killing is not prohibited, or brought from another State where there is no such prohibition; that the Legislature had full power to pass said act; and that the prohibitions thereof so far as they relate to game the property of which was cleared after the passage of the act are not in conflict with the provision of the State Constitution (Const., Article I., sec. 6), declaring that no person shall be deprived of property, etc., without due process of law; nor is said act violative of the provision of the Constitution of the United States (U. S. Const., Art. I., sec. 8, sub. 3), which authorizes Congress to regulate commerce among the States or in conflict with any law of Congress.

Chief Judge Church said:

> "The protection and preservation of game has been secured by law in all civilized countries and may be justified on many grounds, one of which is for the purposes of food. The measures best adapted to this end are for the Legislature to determine, and courts cannot review its discretion. If the regulations operate in any respect unjustly or oppressively the proper remedy must be applied by that body. Some of the provisions of the act in question might seem to one unversed in the mysteries of the subject to be unnecessarily stringent and severe, but we cannot say that those involved in this action are foreign to the objects sought to be attained or outside of the wide discretion vested in the Legislature."

In his brief in the Court of Appeals the learned counsel for the relator argued earnestly against the efficacy of such legislation, and, in support of his contention that such enactments are of doubtful utility in protecting native game, he referred to the opinion of Mr. Justice

O'Brien in the case of the People *vs.* Buffalo Fish Company, 164 N. Y., 93. In the course of his opinion, the learned Justice said:

> "The main proposition, after all, in support of the plaintiff's contention is based more upon policy and expediency than upon law. When fairly stated it is this: A statute to protect fish and game within the State does not protect unless it inhibits the importation of fish and game from a foreign country or another State. When this proposition is carefully examined it will be found to be not only without any foundation in fact, or in experience, but when applied to cases like the one in hand the manifest tendency is to defeat the very object of the law, which, of course, must be assumed to be protection. The individual who is permitted to hunt and fish in Canada or in another State, and bring with him here the fruits of his labor, will do very much less of hunting and fishing at home. If his warfare upon game or fish is carried on in a foreign country, or in another State, it would seem to be unwise to prevent him for the purpose of protecting fish and game at home. The game law that cuts off the supply from abroad diminishes rather than increases and protects the supply at home. Legislation that would prohibit the defendant from drawing a supply of fresh fish from Canada during the close season simply furnishes a strong temptation to procure it from the waters of this State, even in violation of law. It is said that there is a passion inherent in man to kill or capture game in spite of penal laws forbidding it. If that be so it would seem to be wisdom to allow the passion to expend itself by permitting those who enjoy it to capture and become possessed of fish or game in Canada, or in other States where the law permits it, rather than furnish a temptation to violate the law at

home during the close season. To forbid the taking of fish in a foreign country, or in another State where it is lawful, by our own citizens during the season, or the possession within the State of what is so taken, tends to exterminate rather than protect fish here. The legislator who would protect the forests of this State by prohibiting the importation of lumber or timber from Canada, or from other States, would be rated as a visionary theorist, but in a certain degree that is the principle upon which the argument for the People in this case proceeds for the protection of fish and game. What is true with respect to the forests is equally true of every other natural product of the soil or of the waters of the State, so that it is plain that the plaintiff's theory of this case, when put into complete operation all around the boundaries of the State would, instead of protecting fish and game, go far to exterminate both" (p. 106).

An examination of the facts in the Buffalo Fish case, however, will disclose that the remarks of Mr. Justice O'Brien, although interesting, were superfluous, for the New York Game Law as it existed when the defendant was alleged to have violated it, by having in his possession during the close season certain fish described as pike, pickerel, bass and muskallonge, taken in Canada, was held by the Court of Appeals to apply only to *such* fish as are taken from the waters of New York State, and not to those imported from a foreign country. The question before the Court of Appeals, therefore, was one of construction, and as the Court decided that the language of the act was not sufficiently broad to prohibit the importation of fish from Canada, the condemnation by Mr. Justice O'Brien of statutes enacted for the purpose of protecting native fish or game by the prohibition of their importation from other States or foreign countries, while interesting as an expression of individual opinion, was entirely unnecessary to the decision of the case.

In connection with this subject it is interesting to note the comments made by Mr. Justice Gray, who wrote the dissenting opinion, in which two of his associates concurred:

> "It was also observed by the learned Justice, in his opinion, that 'the object of the statute is to protect the game fishes in the waters of the State, and that object is not promoted by depriving citizens of their property in fish which have been caught and killed outside of the jurisdiction of the State, and which have become component parts of commerce, and the law cannot, therefore, be sustained as an exercise of the police power, except as it deals with those fish which may have been taken within the jurisdiction of the State.' Prior to this decision of the learned Court below, Phelps *vs.* Racey was regarded as settling the question of the legislative power to do just what has been done in the law now attacked. That was an action which was brought under the Game Law of 1871, to recover penalties against the defendant for having in possession, contrary to the statute, certain game birds during the close season. The defense was that the defendant became possessed of them during the open season, or they were received from the States of Minnesota or Illinois, where the killing at the time was lawful. Thus the situation was the same as in the present case; so far as it presented the legal questions. It was there held that the fact alleged that the game 'was either killed within the lawful period, or brought from another State where the killing was lawful' constituted no defense; inasmuch as the penalty was denounced against the selling or possession, irrespective of the time or place of killing. The objection of a want of power in the Legislature to pass the act was held to be untenable, and it was said

that the measures best adapted for the protection and the preservation of game 'are for the legislature to determine and the courts can not review its discretion. If the regulations operate, in any respect, unjustly or oppressively, the proper remedy must be applied by that body;' and the provisions of the act, though seemingly stringent and severe, were not 'foreign to the objects sought to be attained, or outside of the wide discretion vested in the legislature.' In speaking of the argument that the law violated the commerce clause of the Federal Constitution, Chief Judge Church deemed it unnecessary to consider 'how far the exercise of the power of Congress under the provision would interfere with the authority of the state to pass game laws, and regulate and prohibit the sale and possession of game either as a sanitary measure or for its protection as an article of food. It will suffice for this case that the statute does not conflict with any law which Congress has passed on the subject.' The authority of this case upon the constitutional right to enact such laws has been widely recognized in the State courts, where similar statutory provisions were assailed, and, among other cases, might be cited those of Magner *vs.* The People (97 Ill., 320); Commonwealth *vs.* Savage (155 Mass., 278); State *vs.* Rodman (58 Minn., 393), and Roth *vs.* State (7 Ohio C. C., 62). In England the case of Whitehead *vs.* Smithers (L. R., 2 Com. Pl. Div., 553), may be referred to as in point; where Chief Justice Coleridge observed of the act for the protection of wild fowl, passed in 1876, that 'the object is to prevent British wild fowl from being improperly killed and sold under pretence of their being imported from abroad.' (And see Price *vs.* Bradley, L. R. (16 Q. B. Div.), 148, upon the Fresh Water Fisheries Act).

"In the Court below, Phelps *vs.* Racey was deemed to be no longer controlling; for the reason that its principles have been 'overruled by subsequent judicial authority.' The reference is to that part of the opinion which suggests the proposition that, in the absence of the enactment of a law by Congress, the states may regulate commerce among themselves. This doctrine, though supported by authority at the time (Pierce *vs.* New Hampshire, 5 How. (U. S.), 504), would seem to have been overruled by later cases. (Leisy *vs.* Hardin, 135 U. S., 100; and Schollenberger *vs.* Pennsylvania, 171 *ib.*, 1.); which hold that laws inhibiting the receipt of an imported commodity, or its disposition, amount essentially to a regulation of commerce with foreign nations, or among the States. I consider, however, that the Fisheries Law presents no conflict with the commerce clause of the Federal Constitution and that it is purely a governmental regulation, within the legitimate exercise of the police power of the State, relating to a matter essentially of internal policy, as affected by a common public interest. It was quite unnecessary to the decision of Phelps *vs* Racey that Chief Judge Church should have expressed himself as he did upon the question of the bearing of the statute upon the commerce clause of the Federal Constitution, and it did not prevent the decision from being controlling upon the main question. There is no question of interstate or foreign commerce, in my opinion, but merely one of whether, in the interest of the protection and preservation of game fishes, the legislature may not competently enact a statute so stringent in its provisions as to insure the accomplishment of the end in view, however it might result in an apparent restriction of the liberty of the citizen. * * * (pp. 108-111).

"The object of this statute was to protect and preserve certain game fishes during the breeding season; an object, manifestly, in which the people of the State may be presumed to be more or less keenly interested, and which is recognized, as Judge Church observed, in all civilized countries. The purpose is to protect certain fishes within our jurisdiction, with no reference to those of other States or countries. If they may be brought into the State within the close season here, as articles of commerce protected by United States laws and, therefore, placed beyond the reach of State laws declaring and regulating an internal policy, the result would be to facilitate evasions of the law and to make detection difficult, if not impossible. The general tendencies of human nature, it might, not inappropriately, be observed, are such as to make necessary so strict a law as to render obedience to the mandate certain. The statute aims at preventing game fishes from being unlawfully taken and exterminated, and any regulation which tends to secure that aim should be regarded as a legitimate and fair exercise of the police power. * * *" (p. 112).

"Nor can I perceive that the doctrine of the oleomargarine cases is applicable (Schollenberger *vs.* Pennsylvania, 171 U. S., 1.). There is a clear distinction between legislation, which discriminates with reference to a manufactured food product, not impure nor unhealthful, and legislation which seeks to preserve the game fishes within the waters of the State, either as a natural article of food supply, or as a form of public sport. In the one case there is an interference with commerce, as commerce; in the other case, commerce i not aimed at, but the preservation from extermination of the people's property in game fishes. In the one case there is

interference with commercial dealing in a manufactured product, which, not unreasonably, may be said to lack justification in those ordinarily recognized principles upon which the police power of the State is properly exercised; while, in the other case, the preservation from extermination of the game fishes within the jurisdiction of the State, reasonably, commends itself as legislation in the interest of preserving to the people a valuable natural and common food supply, which is deemed in danger of being destroyed and which it is, therefore, the duty of the State to prevent by the exercise of its undoubted police power. The Schollenberger case dealt with the prohibition by legislation of oleomargarine as a law 'which prevents the introduction of a perfectly healthful commodity, merely for the purpose of in that way more easily preventing an adulterated and possibly injurious article from being introduced. We do not think this is a fair exercise of legislative discretion, when applied to the article in question'" (per Peckham, *J.*, at p. 15, pp. 113, 114).

The principles governing the nature, quality and extent of the individual's property in game birds were admirably stated by Mr. Justice White in the case of Geer *vs.* Connecticut (161 U. S., 517).

In the course of his extremely interesting opinion the learned justice said:

"Aside from the authority of the State derived from the common ownership of game and the trust for the benefit of its people which the State exercises in relation thereto, there is another view of the power of the State in regard to the property in game which is equally conclusive. The right to preserve game flows from the undoubted existence in the State of a police power to that end which may be

none the less sufficiently called into play because by doing so interstate commerce may be remotely and indirectly affected (Citing Kidd *vs.* Pearson, 128 U. S., I; Sherlock *vs.* Alling, 93 *id.*, 99, 103; Gibbons *vs.* Ogden, 22 *id.*, 9 Wheat., 194).

"Indeed the source of the police power as to game birds flows from the duty of the State to preserve for its people a valuable food supply. The exercise by the State of such a power, therefore, comes directly within the principle of Plumley *vs.* Massachusetts, 155 U. S., 461, 473. The power of a State to protect by adequate police regulations its people against the adulteration of articles of food (which was in that case maintained), although in doing so commerce might be remotely affected, necessarily carries with it the existence of a like power to preserve a food supply which belongs in common to all the people of the State, which can only become the subject of ownership in a qualified way, and which can never be the object of commerce except with the consent of the State and subject to the conditions which it may deem best to impose for the public good."

It is respectfully submitted that the foregoing authorities abundantly support these propositions:

Traffic in game birds is not governed by the rules which affect ordinary articles of commerce, for the reason that when property in them may be acquired is so peculiarly a matter of State regulation that their possession is controlled by rules entirely different from those which apply to general articles of merchandise.

The right of the individual to acquire property in game birds must yield to the superior authority of the State to restrict their use and possession.

Laws passed for the protection of game do not interfere with private property.

Each State has the right to enact such laws for the protection of its game as to it shall seem best for the accomplishment of that purpose, and the methods observed by the State Legislature for the protection of game are necessarily within its discretion.

A State statute prohibiting the possession of game during certain seasons, from whatever source derived, is a reasonable method of protecting the domestic game of the State making the prohibition.

Game can only be the subject of ownership in a qualified way and can never be the subject of commerce except with the consent of the State and subject to the conditions which it may deem best for the public good.

The New York Forest, Fish and Game Law is not a regulation of commerce within the meaning of the Federal Constitution; and the argument that its enactment was in violation of the powers confided exclusively to Congress fails.

We are strongly inclined to the belief that the State of New York did not need the sanction of Congress to authorize it to prohibit, for the protection of its native game, the possession during its close season of game birds taken without the State or imported from foreign countries. In Geer *vs.* Connecticut, *supra,* the statute in terms prohibited interstate commerce in game lawfully reduced to possession in the State of Connecticut, but this Court held that as the right to preserve game flows from the undoubted existence in the State of a police power to that end, it may be none the less sufficiently called into play even if by so doing interstate commerce may be remotely and directly affected. In the case at bar the

statute does not in terms or effect prohibit interstate or foreign commerce. The importation of the birds by petitioner was perfectly lawful and his possession of them would have continued lawful had he observed the statute by giving the bond required. (Section 141 of Forest, Fish and Game Law.) It seems to us, therefore, that the constitutional questions presented by relator's assignment of alleged errors are neither serious nor difficult. And if there be any doubt that the statute in question is in conflict with the commerce clause of the Federal Constitution, it seems to us to be entirely removed by the enactment of the Lacey Act. So far as we are aware the Lacey Act has never been construed by this Court. It has, however, been the subject of careful consideration by the New York Court of Appeals in two cases, to wit: The People *vs.* Bootman, 180, N. Y., 1, and in the case at bar (184, N. Y., 126). While the discussion of the provisions of the Lacey Act was not directly necessary to the Court's decision in People *vs.* Bootman, the views there expressed were subsequently approved in the unanimous opinion delivered by the Court of Appeals in the present case.

Mr. Chief Justice Cullen, said:

> "But it is said Congress permits the importation of foreign game and collects the duty thereon, and it cannot have intended to allow property thus imported to be confiscated. The proposition that Congress allows the importation of foreign game is true only in a restricted sense. By the "Lacey Act" Congress determined to aid the states in the enforcement of their game laws, but did not deem it wise to enact a game law of its own, and this for the very obvious reason that the game laws of the different States vary greatly, a variation justified in no small degree by varying climatic conditions. It would be unwise to entirely prohibit the importa-

tion of game into the country during a part of the year during which in some of the States the taking and consumption of such game is lawful. So Congress practically said to the citizen: 'We do not prohibit the importation of foreign game, but subject it to the local laws, and you must see to it, at your risk, that you do not violate those laws.'" (P. 134).

IV.

The judgment from which this writ of error was allowed should be affirmed.

Respectfully submitted,

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